Volume 7, No. 2, Pages 400 to 797, January 13 - 24, 1992

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

ALFRED C. SIKES, CHAIRMAN

James H. Quello
Sherrie P. Marshall
Andrew C. Barrett
Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 7 FCC Rcd 1 (1992)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 7
Issue 2

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 400

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 2

Case Name	Page
AMSC Subsidiary Corporation	735
AT&T Communications	431
AT&T Communications	534
AT&T Communications	535
AT&T Communications	558
AT&T Company	538
Advanced Telecommunications Corporation	401
Afton Communications Corporation	514
Amendment of C-Band Satellite Orbital Spacing Policies	456
Amendment of Part 22 - License Renewals	719
Amendment of Part 76 - Network-Cable Cross-Ownership Rules	586
American Telephone and Telegraph Company	445
American Telephone and Telegraph Company	533
American Telephone and Telegraph Company	428
American Telephone and Telegraph Company	536
American Telephone and Telegraph Co. v. Cincinnati Bell	439
Arkansas AFL-CIO and the Committee Against Amendment 2	541
Atlantic Radio Communications, Inc.	486
BellSouth Telephone Companies	596
Bible Broadcasting Network, Inc.	432
Canton 67, Ltd.	736
Citizens Utilities Company of Kingman, Arizona	478
Codification of Commission's Political Programming Policies	678
Colonial Communications, Inc.	674
Common Carrier Public Mobile Service Info.- Cellular Markets	742
Continental Cablevision of Ohio, Inc.	499
Dann Comm Paging	518
Danny's Two Way Communications, Inc.	513
Diversified of Tennessee, Inc.	443
Dry Prong Educational Broadcasting oundation	496
Execuline of Sacramento, Inc.	442
First Phone of New England, Inc.	407
GTE Telephone Operating Companies	479
GTE's Petitions for Waiver of Part 69	713
Givens, Roxanne	489
Heart of Texas Comm. Ltd.	664
ISIS Broadcast Group	599
Independent Telcos of St. Croix County	515
Jaybar Communications	672
Kennelwood Broadcasting Company, Inc.	520
LDDS Communications, Inc.	440
Litel Telecommunications, Corp.	438

Case Name	Page
Local Exchange Carrier Line Information Database	525
Lone Cypress Radio Associates, Inc.	415
Long Distance Service of Washington, Inc.	406
Long Distance/USA, Inc.	408
Longview Cable Television Co., Inc.	648
Lubbock Area Public Safety Plan	540
MCI Telecommunications Corporation	427
Megastar, Inc.	492
Metromedia Company	714
Mid Atlantic Telecom, Inc.	403
NYNEX Telephone Companies	598
National Exchange Carrier Association	429
Normandy Broadcasting Corp.	509
One Call Communications, Inc.	404
Open Network Architecture Access Tariffs	521
Outlet Communications, Inc.	632
Pacific Bell and Nevada Bell	710
Palmetto Communications Company	676
Phalen, Shawn	623
Polar Communications Corp.	717
Pougkeepsie Broadcasting Limited	658
Rancho Mirage Radio	480
Regulation of International Accounting Rates	559
Regulation of International Common Carrier Service	577
Review of Technical and Operational Requirements	490
Carriers File Revisions to Cost Allocation Manuals	477
South Tel, Inc.	444
Sunshine Broadcasting, Inc.	493
TFN Corp.	405
Table of Allotments, FM, Belton, TX	400
Table of Allotments, FM, Carolina Beach, NC	544
Table of Allotments, FM, Greenacres, CA	503
Table of Allotments, FM, Hastings, NE	666
Table of Allotments, FM, Kershaw, SC and Waxhaw, NC	656
Table of Allotments, FM, Milford and Hastings, NE	653
Table of Allotments, FM, Oak Creek, CO	505
Table of Allotments, FM, Oxford, MS	651
Table of Allotments, FM, Perham, MN	741
Table of Allotments, FM, Piedmont, MO	652
Table of Allotments, FM, Prineville, OR	501
Table of Allotments, FM, Safford, AZ	740
Table of Allotments, FM, Scotland Neck and Pinetops, NC	654
Table of Allotments, FM, Shreveport and Bastrop, LA	470
Table of Allotments, FM, Stock Island, FL	667
Table of Allotments, FM, Texarkana, AR	507
Table of Allotments, TV, Calipatria, CA	650

FEDERAL COMMUNICATIONS COMMISSION

Case Name	Page
Tele-Communications, Inc.	660
Telecom*USA, Inc.	402
Telephone Company - Cable Television Cross-Ownership Rules	712
Templeton, Inc.	556
Teton Communications Incorporated	511
Toledo Broadcasting, Inc.	669
Triad Communications Company	662
US West Communications	543
Virgin Islands Telephone Corporation	711
WWOR-TV, Inc.	636
Welch Communications, Inc.	568

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 2

Delegated Authority or FCC Number	Page
DA 91 -1591	431
DA 91 -1592	521
DA 91 -1593	543
DA 91 -1597	427
DA 91 -1599	429
DA 91 -1627	511
DA 91 -1637	525
DA 91 -1645	533
DA 91 -1646	428
DA 91 -1652	492
DA 92 - 1	540
DA 92 - 3	400
DA 92 - 5	534
DA 92 - 6	535
DA 92 - 7	536
DA 92 - 8	496
DA 92 - 10	408
DA 92 - 11	509
DA 92 - 12	401
DA 92 - 13	402
DA 92 - 14	403
DA 92 - 15	404
DA 92 - 16	405
DA 92 - 17	406
DA 92 - 18	407
DA 92 - 19	477
DA 92 - 20	438
DA 92 - 21	439
DA 92 - 22	440
DA 92 - 23	442
DA 92 - 25	443
DA 92 - 26	444
DA 92 - 27	501
DA 92 - 28	503
DA 92 - 29	505
DA 92 - 30	558
DA 92 - 31	538
DA 92 - 32	478
DA 92 - 34	479
DA 92 - 35	710
DA 92 - 36	507
DA 92 - 37	596
DA 92 - 38	598
DA 92 - 39	650
DA 92 - 40	735
DA 92 - 41	513
DA 92 - 42	666
DA 92 - 44	740
DA 92 - 45	667
DA 92 - 46	741
DA 92 - 47	651
DA 92 - 48	652
DA 92 - 50	653
DA 92 - 51	654
DA 92 - 52	656
DA 92 - 53	514
DA 92 - 54	515
DA 92 - 55	518
DA 92 - 56	711
DA 92 - 57	712
DA 92 - 58	713
DA 92 - 59	714
DA 92 - 60	664
DA 92 - 61	717
DA 92 - 66	672
DA 92 - 109	742
FCC 91 - 400	719
FCC 91 - 401	559
FCC 91 - 402	577
FCC 91 - 403	678
FCC 91 - 405	586
FCC 91 - 417	445
FCC 91 - 420	556
FCC 91 - 421	470
FCC 91 - 428	636
FCC 91 - 431	632
FCC 91 - 432	674
FCC 91 - 433	490
FCC 91 - 434	541
FCC 91R - 121	432
FCC 92 - 1	456
FCC 92 - 2	520

FEDERAL COMMUNICATIONS COMMISSION

Delegated Authority or FCC Number	Page
FCC 92 - 3	658
FCC 92 - 4	544
FCC 92 - 5	669
FCC 92 - 6	648
FCC 92 - 7	499
FCC 92 - 11	660
FCC 92 - 12	676
FCC 92 - 13	736
FCC 92 - 15	662
FCC 92D - 2	415
FCC 92D - 3	599
FCC 92D - 4	568
FCC 92R - 1	623
FCC 92R - 2	480
FCC 92R - 3	486
FCC 92R - 4	489
FCC 92R - 5	493

Table of Cases by Docket Number
Volume 7
Issue 2

Docket Number				Page
CC	Dkt.No.87	-	266	712
CC	Dkt.No.89	-	79	710
CC	Dkt.No.90	-	124	711
CC	Dkt.No.90	-	337	559
CC	Dkt.No.90	-	358	719
MM	Dkt.No.82	-	434	586
MM	Dkt.No.84	-	231	470
MM	Dkt.No.85	-	36	490
MM	Dkt.No.87	-	426	623
MM	Dkt.No.88	-	3	674
MM	Dkt.No.88	-	382	636
MM	Dkt.No.88	-	432	568
MM	Dkt.No.89	-	326	544
MM	Dkt.No.89	-	338	520
MM	Dkt.No.89	-	357	676
MM	Dkt.No.89	-	387	489
MM	Dkt.No.89	-	440	507
MM	Dkt.No.89	-	441	650
MM	Dkt.No.90	-	10	480
MM	Dkt.No.90	-	43	493
MM	Dkt.No.90	-	94	432
MM	Dkt.No.90	-	218	599
MM	Dkt.No.91	-	31	656
MM	Dkt.No.91	-	110	653
MM	Dkt.No.91	-	168	678
MM	Dkt.No.91	-	208	486
MM	Dkt.No.91	-	234	666
MM	Dkt.No.91	-	274	652
MM	Dkt.No.91	-	276	400
MM	Dkt.No.91	-	277	651
MM	Dkt.No.91	-	306	740
MM	Dkt.No.91	-	315	741
MM	Dkt.No.92	-	2	496
MM	Dkt.No.92	-	3	501
MM	Dkt.No.92	-	4	503
MM	Dkt.No.92	-	5	505
MM	Dkt.No.92	-	6	509
MM	Dkt.No.92	-	7	654
MM	Dkt.No.92	-	8	667
PR	Dkt.No.92	-	1	540

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 2

Rulemaking Number	Page
RM - 5094	470
RM - 5381	470
RM - 5604	470
RM - 6406	470
RM - 6706	470
RM - 6763	507
RM - 6813	650
RM - 7325	470
RM - 7372	470
RM - 7459	470
RM - 7535	656
RM - 7578	577
RM - 7627	456
RM - 7628	456
RM - 7678	653
RM - 7713	667
RM - 7745	666
RM - 7802	652
RM - 7804	400
RM - 7810	651
RM - 7824	740
RM - 7830	741
RM - 7874	501
RM - 7878	505
RM - 7879	654
RM - 7880	503

Table of Cases by City
Volume 7
Issue 2

City/State	Page	City/State	Page
Bastron, AR	470	Milford, NE	653
Belton, TX	400	Montecito, CA	623
Belton, TX	664	Noblesville, IN	432
Calipatria, CA	650	Oak Creek, CO	505
Canton, OH	736	Oxford, MS	651
Carmel, CA	415	Perham, MN	741
Carolina Beach, NC	544	Philadelphia, PA	714
Denver, CO	660	Piedmont, MO	652
Dry Prong, LA	496	Pinetops, NC	654
Eden Prairie, ME	489	Princeville, OR	501
Finneytown, OH	513	RanchoMirage, CA	480
Glenn Falls, NY	509	Safford, AZ	740
Greenacres, CA	503	Santa Barbara, CA	599
Greensboro, NC	676	Scotland Neck, NC	654
Hastings, NE	653	Secaucas, NJ	636
Hastings, NE	666	Shreveport, AR	470
Indianapolis, IN	632	St. Croix, MN	515
Kershaw, SC	656	Stock Island, FL	667
Kingman, AZ	478	Swanton, OH	568
Little Rock, AR	541	Tazewell, VA	514
Longview, TX	648	Texarkana, AR	507
Manahawkin, NJ	486	Toledo, OH	669
Middletown, OH	518	Waco, TX	520
		Waxhaw, NC	656

Subject Index
Volume 7
Issue 2

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Financial qualifications	623
Integration of ownership into management, quantitative	480, 520, 623
Misrepresentation and lack of candor	636
Real party in interest	623
Orders or Notices	
Lottery to select licensee	496, 509
Review Board or Commission Decision	
Financial qualifications	568
Integration of ownership into management, qualitative experience	599
Misrepresentation and lack of candor	568
Real party in interest	415
Reopening of record	415, 568
Broadcast Radio Services - General Rules	
Applications for authorization	
Conflicts in applications, agreement for removing	636
Program contents	
Candidates for public office	632
Records kept by stations	
Equal employment opportunity program	669
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	400, 470, 544, 501 503, 505, 507, 651
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	650
Cable Television Service	
Markets and services	
Crossownership: limitation on cable company carrying a TV signal	586
Signals a cable system may carry, other TV	648
Network nonduplication protection	
Signals, priority of	499
Rules	
Waiver by Commission of any provision	499
Technical regulations	
Signal leakage performance criteria	660, 662
Standards: frequencies/signal levels and radiation	660, 662

Subject	Page
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	559, 427, 492, 717
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	521, 543, 710
Common Carriers/Affiliates: Reports	
Contracts and concessions with respect to communication traffic	559
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	477, 479
Communications Act of 1934	
Common Carriers	
Discrimination and preferences	577
Extension of lines, certificate for	559, 427
Service and charges	577
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	664
Procedural and Administrative provisions	
Inquiry by Commission on its own motion	556
Radio, provisions for	
Candidates for public office, facilities for	632
Radio, provisions relating to	
Applications, special requirements with respect to	636
Applications;form of and conditions attached to licenses	714, 669
Licenses and conditions for foreign communication, applications	556
Jurisdictional Separations Procedures	
Facilities and property	
C&WF(Category 1),apportionment procedures in exchange line	478
Practice and Procedure	
Common carriers: complaints	
Formal or informal	438, 439, 440, 442 443, 444, 401, 402 404, 405, 406, 407
Hearing proceedings: participants and issues	
Intervene, petitions to	486
Hearing proceedings: presiding officer's rulings	
Final ruling, appeal from	486, 489

Subject	Page
Proceedings, miscellaneous	
Forfeiture proceedings	514
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	676
Reconsideration of a final FCC action, petition for	493, 674
Public Mobile Service	
Applications and licenses-filing requirements	
Forms and permissive changes or minor modifications	514
Applications and licenses-processing	
Mutually exclusive applications	515
Developmental authorizations	
Eligible for authorization, communication common carriers	511
Miscellaneous	
Discontinuance of station operation, procedure for	518
Technical standards	
Transmitters, procedure for and lists of type accepted	511
Statutory Citations Other than Communications	
Administrative Procedure	
Information,public; agency rules, opinions, orders	556
Telecommunications Companies: Classes A and B	
Nonregulated activities	477, 477, 479, 479

TABLE OF STATUTORY AND RULE PROVISION

	Page
001.080 Forfeiture proceeding	514
001.106 Petition for Reconsideration, Denied	493
001.106 Petitions for reconsideration	658
001.106 Petitions for Reconsideration	674
001.115 Application for Review	676
001.223 Petition to Intervene, Denied	486
001.301(a)(5) Removal of Counsel	676
001.302 Appeal, Denied	489
001.302 Appeal, Dismissed	486
001.711 Formal or informal complaints	401
001.711 Formal or informal complaints	402
001.711 Formal or informal complaints	403
001.711 Formal or informal complaints	404
001.711 Formal or informal complaints	405
001.711 Formal or informal complaints	406
001.711 Formal or informal complaints	407
001.711 Formal or informal complaints	438
001.711 Formal or informal complaints	439
001.711 Formal or informal complaints	440
001.711 Formal or informal complaints	442
001.711 Formal or informal complaints	443
001.711 Formal or informal complaints	444
022.009 Standard App. Forms and Permi, Change	514
022.120 Type accepted equipment	511
022.303 Discontinuance of station operation	518
022.400 Developmental authorization	511
022.940 Basic qual's standards for appl'ts filing compet'g a	719
022.941 Criteria for compar. cellular. renewal proceedings.	719
022.942 Procedures for comparative renewal proceedings.	719
032.014 Regulated Accounts	477
032.014 Regulated Accounts	479
032.023 Nonregulated Activities	477
032.023 Nonregulated Activities	479
043.051 Contracts and Concessions	559
063.001 Contents of Application	427
063.001 Contents of Applications	445
063.001 Contents of Applications	559
063.001 Contents of Applications	717
063.001 Extension of Lines	492
063.01 Contents of Applications	577
064.901 Allocation of Costs	477
064.901 Allocation of Costs	479
069.105 Carrier common line	408
073.1212 Sponsorship identification	678
073.1216 Licensee conducted contests	664
073.1940 Broadcasts by candidates for public office	678
073.1940 Candidates for Public Office	632
073.202 FM Table of Allotments	400
073.202 FM Table of Allotments	470
073.202 FM Table of Allotments	501

073.202 FM Table of Allotments 503
073.202 FM Table of Allotments 505
073.202 FM Table of Allotments 507
073.202 FM Table of Allotments 544
073.202 FM Table of Allotments 651
073.202 FM Table of Allotments 652
073.202 FM Table of Allotments 653
073.202 FM Table of Allotments 654
073.202 FM Table of Allotments 656
073.202 FM Table of Allotments 666
073.202 FM Table of Allotments 667
073.202 FM Table of Allotments 740
073.202 FM Table of Allotments 741
073.1910 Fairness Doctrine 541
073.2080 Equal Employment Opportunity 669
073.3525 Agreements for removing application conflicts 636
073.3540 Assignment of License 736
073.606 TV Table of Allotments 650
076.007 Special Relief 499
076.092 Network non-duplication extent of protection 499
076.151 Syndicated program exclusivity extent of protection 499
076.205 Cablecasts by candidates for public office 678
076.221 Sponsorship identification 678
076.501 Cross-Ownership 586
076.60 Carriage of other television signals 648
076.605(a)(11), Technical Standards 660
076.605(a)(11), Technical Standards 662
076.611 Cable Basic Signal Leakage Performance Criteria 660
076.611 Cable Basic Signal Leakage Performance Criteria 662
1500.3005 Integration of Ownership into Management, Qualitat 432
1500.3045 Diversification of Control of Mass Media 432
300.201 Service and Charges 577
300.202 Discrimination and Preferences 577
300.208 Complaints to the Commission 408
300.214 Contents of Applications 492
300.214 Extension of Lines 427
300.214 Extension of Lines 445
300.214 Extension of Lines 559
300.214 Extension of Lines 577
300.214 Extension of Lines 717
300.308 Applications for Licenses; Conditions in License 556
300.308(b) Financial qualifications 714
300.309 Action Upon Applications 669
300.309(d)(1)standing 714
300.311 Special requirements with respect to certain applica 636
300.312 Reasonable access for federal candidates 678
300.315 Equal Opportunities 632
300.315 Facilities for candidates for public office 678
300.317 Sponsorship identification 678
300.403 Inquiry By Commission On Its Own Motion 556
300.503(b) Forfeiture proceeding 664
300.508 Contests 664
400.05552 Public Information; agency rules, opinions, order 556
47 C.F.R. Section 0.291 delegated authority 428

47 C.F.R. Section 0.291 delegated authority 429
47 C.F.R. Section 0.291 delegated authority 431
47 C.F.R. Section 0.291 delegated authority 521
47 C.F.R. Section 0.291 delegated authority 525
47 C.F.R. Section 0.291 delegated authority 534
47 C.F.R. Section 0.291 delegated authority 535
47 C.F.R. Section 0.291 delegated authority 536
47 C.F.R. Section 0.291 delegated authority 538
47 C.F.R. Section 0.291 delegated authority 543
47 C.F.R. Section 0.291 delegated authority 558
47 C.F.R. Section 0.291 delegated authority 596
47 C.F.R. Section 0.291 delegated authority 598
47 C.F.R. Section 0.291 delegated authority 711
47 C.F.R. Section 1.701 show cause orders 533
47 C.F.R. §63.54, Facilities for Provision of Video Program 712
47 CFR §69 Access Charges 713
500.100 496
500.100 HDO 509
500.2005 Integration of ownership into management, qualitati 599
500.2035 Integration of ownership into management, quantitat 599
500.2040 Integration of ownership into management, questions 599
500.2045 Diversification of control of mass media 599
500.2095 - Abuse of Process 568
500.2125 - Misrepresentations and lack of candor 568
500.2135 Real party-in-interest 415
500.2170 - Financial Qualifications 568
500.3005 Integration of ownership into management, qualitati 520
500.3035 Integration of Ownership Into Management, Quantitat 480
500.3035 Integration of ownership into management, quantitat 520
500.3035 Integration of ownership into management, quantitat 623
500.3040 Integration of ownership into management, questions 623
500.3100 abuse of process 636
500.3125 misrepresentation and lack of candor 636
500.3135 Real party in interest 623
500.3170 Financial qualifications 623
Part 74, Subpart F -- Television Broadcast Auxiliary Station 490
Part 74, Subpart H -- Low Power Auxiliary Stations 490
Petition of Waiv Sect. 36.154(d) 478
Satellite Orbital Spacing, RM-6527/RM-7628 456
Sec. 309(a): application grants 672
Section 22.31 Mutually exclusive applications. 515
Section 22.903 "Cellular" system service "areas 515

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-276

In the Matter of

Amendment of Section 73.202(b), RM-7804
Table of Allotments,
FM Broadcast Stations.
(Belton, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 3, 1992; Released: January 9, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Sheldon Communications, Inc. ("petitioner"), licensee of Station KOOC(FM), Channel 292A, Belton, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5564 (1991), proposing the substitution of Channel 292C3 for Channel 292A at Belton, Texas, and modification of Station KOOC(FM)'s license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 292C3 for Channel 292A at Belton, since it would provide the community with a wide coverage area FM service. Channel 292C3 can be allotted to Belton in compliance with the Commission's minimum distance separation requirements and can be used at Station KOOC(FM)'s licensed site.[1] As proposed, we will also modify petitioner's license for Station KOOC(FM) to specify operation on Channel 292C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Belton, Texas	292C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sheldon Communications, Inc. for Station KOOC(FM), Belton, Texas, IS MODIFIED to specify operation on Channel 292C3, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sheldon Communications, Inc., licensee of Station KOOC(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 292C3 at Belton are North Latitude 31-03-46 and West Longitude 97-31-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION, AND ITS SUBSIDIARIES,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	E-90-352
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-353
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-354
MICHIGAN BELL TELEPHONE COMPANY,	E-90-355
WISCONSIN BELL, INC.,	E-90-356
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-357
NORTHWESTERN BELL TELEPHONE COMPANY and	E-90-360
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-361
Defendants.	

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 656 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	E-90-346
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-347
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-348
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-351
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-362
PACIFIC NORTHWEST BELL TELEPHONE COMPANY and	E-90-363
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-364
Defendants.	

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 664 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID ATLANTIC TELECOM, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-185
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-186
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-187
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-188
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA and	File No. E-90-189
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-190

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 652 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL COMMUNICATIONS, INC.,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-193
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-194
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-195
CINCINNATI BELL TELEPHONE COMPANY,	E-90-197
PACIFIC BELL TELEPHONE COMPANY and	E-90-198
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-199
Defendants.	

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 654 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

In the Matter of

TFN CORP.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-203
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-204
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-205
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-206
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-207
NEW YORK TELEPHONE COMPANY and	E-90-208
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-209
Defendants.	

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 658 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE OF WASHINGTON, INC.,
Complainant,

v.

BELL TELEPHONE OF PENNSYLVANIA,	E-90-287
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-288
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-289
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-290
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-291
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-292
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-293
INDIANA BELL TELEPHONE COMPANY,	E-90-294
MICHIGAN BELL TELEPHONE COMPANY,	E-90-295
OHIO BELL TELEPHONE COMPANY,	E-90-296
NEW YORK TELEPHONE COMPANY,	E-90-297
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-298
PACIFIC BELL TELEPHONE COMPANY,	E-90-299
SOUTH CENTRAL BELL TELEPHONE COMPANY and	E-90-300
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-301
Defendants.	

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 702 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF NEW ENGLAND, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-303
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-304
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-305
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-306
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-307
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-308
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-309
OHIO BELL TELEPHONE COMPANY,	E-90-310
NEW YORK TELEPHONE COMPANY,	E-90-311
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY and	E-90-312
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-313
Defendants.	

ORDER

Adopted: January 2, 1992; Released: January 13, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 661 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE/USA, INC.,
AMERICAN SHARECOM, INC.,
MID-AMERICAN LONG DISTANCE COMPANY,
TELEMARKETING INVESTMENTS, LTD.,
NATIONAL TELECOM OF AUSTIN, and
TOTAL-TEL, USA,
Complainants,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-89-03
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	E-89-04
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-89-05
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-89-06
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-89-07
NEW JERSEY BELL TELEPHONE COMPANY,	E-89-08
THE DIAMOND STATE TELEPHONE COMPANY,	E-89-27
ILLINOIS BELL TELEPHONE COMPANY,	E-89-09
INDIANA BELL TELEPHONE COMPANY, INC.,	E-89-10
MICHIGAN BELL TELEPHONE COMPANY,	E-89-11
THE OHIO BELL TELEPHONE COMPANY,	E-89-12
WISCONSIN BELL, INC.,	E-89-13
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-89-14
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-15
THE PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-89-16
THE BELL TELEPHONE COMPANY OF NEVADA,	E-89-17
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,	E-89-18
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-89-19
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-89-20
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-89-21
NEW YORK TELEPHONE COMPANY,	E-89-22
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-89-23
CENTEL CORPORATION,	E-89-24
CINCINNATI BELL, INC.,	E-89-25
CONTEL CORPORATION,	E-89-26
GTE CORPORATION,	E-89-28
HAWAIIAN TELEPHONE COMPANY,	E-89-29
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.,	E-89-30
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, and	E-89-31
UNITED TELECOMMUNICATIONS, INC.,	E-89-32

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1992; Released: January 13, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The complainants, Long Distance/USA, American Sharecom, the Mid-American Long Distance Company, TeleMarketing Investments, National Telecom of Austin, and Total-Tel, USA, filed formal complaints against the thirty above-captioned defendants. The defendants, with the exception of the National Exchange Carrier Association (NECA), provide local exchange services either directly or through subsidiaries. The complainants allege that the local exchange carrier defendants are, under a NECA tariff provision, assessing terminating carrier common line (CCL) charges at both the terminating and the originating ends of calls made over the complainants' 800 services. This, the complainants claim, violates Sections 201 through 206 of the Communications Act.[1] Section 69.207 of the Commission's rules,[2] and the Common

[1] 47 U.S.C. §§ 201-206.

[2] 47 C.F.R. § 69.207. Section 69.207 specified, *inter alia*, how CCL charges were to be assessed on the originating and terminating ends of a call. Although the pleadings refer to Section 69.207 throughout, effective April 1, 1989, the Commission's Part 69 rules were revised to reflect a change in the bifurcated CCL rates. As a result, subparts B & C were consolidated and reorganized. Section 69.207 was eliminated, and its substance was incorporated into Section 69.105. For the purposes of this proceeding, which was initiated before the revision, we use

Carrier Bureau's *ReadyLine Clarification Order*.[3] For the reasons discussed below and to the extent indicated, we grant the complaints.

II. BACKGROUND

A. Carrier Common Line Charges.

2. Carrier common line charges recover the portion of a local exchange carrier's non-traffic sensitive costs of providing local switched access to interstate long distance carriers that are not recovered through subscriber line charges.[4] Originally, local exchange carriers recovered these costs at each end of a call through a charge assessed equally on both originating and terminating switched access minutes. In the CC Docket No. 86-1 proceeding, however, the Commission created a bifurcated CCL rate system to prevent uneconomic bypass at the originating end.[5] Under this system, the CCL revenue requirement was to be recovered through a fixed rate at the terminating end and a varying but lower rate at the originating end, with the terminating rate initially fixed at $0.0433 per minute beginning on June 1, 1986.[6] In May 1987, NECA filed tariff revisions that retained this same terminating CCL rate but set the originating rate at $0.0069 per minute.[7] Upon the recommendation of the Federal/State Joint Board, the Commission extended the bifurcated approach to CCL charges through November 30, 1988.[8] When the LECs' 1988 access tariffs took effect on January 1, 1988, the terminating CCL charge was reduced to $0.0414 and the originating Hrate to zero.[9] Subsequently, the Commission postponed the expiration date for the bifurcated system of CCL charges until March 31, 1989, in order to consider an appropriate schedule for terminating bifurcated CCL charges.[10] Effective April 1, 1989, the LECs were required to assess originating CCL rates of one cent ($0.01) and to set their terminating CCL rates to recover the remaining interstate CCL revenue requirement.[11]

B. 800 ReadyLine and Similar Services.

3. Following the establishment of the bifurcated system, the LECs encountered a problem concerning 800 service, which normally uses special access at its terminating end. Because an 800 call terminates at such a "closed end,"[12] it would not be assessed a CCL charge on that end. During the period when the CCL rate on the originating end was set at zero, 800 calls also incurred no CCL charge on the originating end. Thus, 800 service would have avoided CCL charges altogether. To prevent this situation, the Commission determined that all calls with just one open end would be assessed the higher CCL rate on whichever end was open.[13] In the case of 800 service, the higher CCL rate was to be assessed on the open originating end.

4. After the release of the *WATS Access Charge Order*, which established the bifurcated CCL rate structure, AT&T implemented its new 800 ReadyLine service, a toll-free, inward calling service.[14] Because ReadyLine service terminated on local common lines instead of the dedicated access lines used by AT&T's conventional 800 service, it had two open ends.[15] To the originating LEC, a ReadyLine call appeared to be like any other 800 service call and, thus, was assessed the higher CCL charge on the originating end. The originating LEC could not determine whether the call was destined to terminate on an open or a closed end. Then, to the terminating LEC, the ReadyLine call appeared to be a regular long distance call terminating on common lines. Thus, the higher CCL charge was again applied. The LECs simply did not have adequate call detail to distinguish ReadyLine service from

---

Sections 69.207 and 69.105 interchangeably.

[3] *See* AT&T Communications Revisions to Tariff F.C.C. No. 2 (800 ReadyLine Service), 2 FCC Rcd 78 (Com.Car.Bur. 1986) (hereinafter *ReadyLine Order*); 2 FCC Rcd 5939 (Com.Car.Bur. 1987) (hereinafter *ReadyLine Clarification Order*); (together *ReadyLine Orders*).

[4] In addition to recovering the non-traffic sensitive costs of the local exchange carriers (LECs), the CCL charges include Long Term and Transitional Support payments, which are used to mitigate the effects of the CCL depooling that commenced on April 1, 1989. The subscriber line charge is a flat per-line charge, billed to the end user, that is designed to recover for the LECs a portion of the costs of LEC plant ("local loops") used in the origination and termination of interstate calls. As of July 1, 1987, the maximum allowable subscriber line charge was $2.60. This amount was increased to $3.20, effective December 1, 1988, and to $3.50, effective April 1, 1989.

[5] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1 (hereinafter *WATS Access Charge Rule Making*); Notice of Proposed Rule Making, FCC 86-1 (released Jan. 6, 1986) (*WATS NPRM*); Report and Order, FCC 86-115, (released Mar. 21, 1986) (*WATS Access Charge Order*), *reconsideration denied*, 2 FCC Rcd 245 (1987) (*Reconsideration Order*), *further reconsideration denied*, 3 FCC Rcd 496 (1988) (*Second Reconsideration Order*); Supplemental Notice of Proposed Rulemaking, FCC 86-116 (released Mar. 25, 1986) (*Supplemental WATS NPRM*); Second Report and Order, FCC 86-377 (released Aug. 26, 1986) (*Second WATS Access Charge Order*).

[6] *WATS Access Charge Order*, para. 27, App. B at para. 12. For the purposes of this order, the terms "originating CCL charge" and "lower CCL charge" will be used interchangeably, as will the terms "terminating CCL charge" and "higher CCL charge." We use these terms in this way to prevent the confusion that may result when the terminating CCL charge is assessed on the originating end.

[7] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 3 FCC Rcd 4543, 4548 (1988) (hereinafter *MTS/WATS Reconsideration Order*).

[8] *MTS/WATS Reconsideration Order*, 3 FCC Rcd at 4548.

[9] *Id.*

[10] *Id.* at 4549.

[11] TS and WATS Market Structure, 4 FCC Rcd 5048, 5048 (1988).

[12] The "closed end" of a call refers to the origination or termination of a call that does not use a common or subscriber line. An "open end" of a call utilizes exchange carrier common line plant to originate or terminate the call. The Commission has found that a call may have no, one, or two open ends. 47 C.F.R. §69.105(b)(1)(ii); *see also MTS/WATS Reconsideration Order*, 3 FCC Rcd at 4555-56 (citing 47 C.F.R. § 69.207).

[13] 47 C.F.R. § 67.105(b)(1)(iii); *see also* MTS and WATS Market Structure, 4 FCC Rcd 5048 (1988).

[14] ReadyLine service used its "customers' existing switched access local exchange lines at the terminating end rather than the dedicated access lines used to terminate AT&T's regular 800 service," thereby providing a way for customers to obtain 800 service without incurring the cost of installing dedicated lines. *See ReadyLine Order*, 2 FCC Rcd at 78.

[15] More recently, several other interexchange carriers, such as the complainants, have offered similar services that also originate on an 800 line open end and terminate on a common line open end.

standard 800 service. Their only other recourse would have been to rely totally upon the interexchange carriers to provide the necessary data.

5. When the Commission adopted Section 69.207 of its rules, the Commission intended that only one higher CCL charge would be assessed on a call with two open ends.[16] In the *ReadyLine Clarification Order*, the Common Carrier Bureau (Bureau) stated that it would be "unlawful for LECs to assess [higher] CCL charges at both the originating and terminating ends on a single call, including calls with two open ends."[17] The Bureau declared that LECs so charging were liable to the interexchange carriers (IXCs) for any overcharges imposed on or after June 1, 1986. Because the higher CCL charge was to be assessed only on the terminating end in such a case,[18] the originating LECs were, in essence, directed to settle these overcharges with the IXCs. Despite the LECs' objections, the Bureau approved using customer-provided lists of 800 calls that had terminated on an open end as a basis for billing credit on the originating end; such a practice, the Bureau noted, had been followed in other cases in which the normal billing system was inadequate.[19]

III. THE PLEADINGS

A. Contentions of the Parties.

6. The complainants are interexchange carriers who provide 800 services. A typical call using these services is initiated by an end user from a common line open end, is routed through a LEC[20] to an 800 line provided by an intermediate IXC such as AT&T, and is then transferred from the 800 line to a complainant's facilities by another LEC. At that point, the complainant generally routes the call through the LEC to the end user being called. If the called end user is outside the local exchange area, however, the complainant sends the call over a private line to the called end user's local exchange area and then through a LEC to the called end user. In both cases, the call will originate and terminate on an open end.

7. The complainants originally initiated an action in the U.S. District Court for the District of Columbia to pursue their claims regarding alleged CCL overcharges. The district court referred the action to the Commission following an agreement between the parties that the subject matter of the suit is within the Commission's jurisdiction. The court "administratively dismissed" the suit without prejudice[21] and retained jurisdiction, noting that "either party may move to vacate the Order of Dismissal and reopen [the] case within 60 days after a final decision by the Federal Communications Commission." [22]

8. Following the dismissal by the district court, the complainants filed an "Application in the Nature of a Formal Complaint" with the Commission.[23] They claim that they provide "ReadyLine-type" services because, like AT&T's ReadyLine service, the complainants' services use 800 service lines and have two open ends. According to the complainants, calls utilizing their 800 services have, since June 1, 1986, been unlawfully assessed the higher CCL charge twice. The LEC at the open originating end assesses the first higher CCL charge against the underlying 800 provider; this charge is then passed on to the complainants in the rates for the underlying 800 service.[24] A LEC at the terminating end, which is also open, assesses a second higher CCL charge directly against the complainants.[25] Citing the Bureau's *ReadyLine Clarification Order*, the complainants assert that their 800 services with two open ends should be assessed only one higher CCL charge.[26] They allege that the defendants "failed to negotiate in good faith" to devise refunds or credits for the CCL overcharges.[27]

9. In addition to claiming a violation of the *ReadyLine Orders*, the complainants maintain that the CCL overcharges and the NECA tariff provision under which the charges were levied violate Sections 201 through 206 of the Communications Act[28] and Section 69.207 of the Commission's rules.[29] They request only declaratory relief from the Commission and have reserved the issue of damages for their district court action, which they intend to renew following completion of the instant proceedings.[30]

---

[16] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[17] *Id.* at 5943.

[18] *Id.* at 5942.

[19] *Id.* at 5943. The Bureau has recently addressed the application of CCL charges to ReadyLine-type services in Teleconnect v. Bell Telephone Co. of Pa., 6 FCC Rcd 5202 (Com. Car. Bur. 1991) (hereinafter *Teleconnect*), *applications for review and petition for reconsideration pending*.

[20] The defendants, with the exception of NECA, are all local exchange carriers or apparently have subsidiaries that provide local exchange services. Several of the defendants that are not LECs themselves -- Centel, Cincinnati Bell, Contel, GTE, and United Telecommunications -- have claimed that it was not proper to name them as defendants. In response, the complainants have asked that we grant them leave to name the LEC subsidiaries as defendants if we deem it necessary. Reply to Answer and Opposition to Motion to Dismiss at 31. We find that the LEC subsidiaries rather than the parent entities should have been named as defendants. We conclude, however, that this error was harmless because the allegations in the complaints were sufficient to allow the parent entities to respond fully on behalf of their LEC subsidiaries. We therefore grant the complainants' request to name the LEC subsidiaries as defendants. Because the complainants intend to litigate the issue of damages in the district court, *see* para. 9, *infra*, the identities of the appropriate LEC subsidiaries can be specified at that time.

[21] Long Distance/USA v. Southern Bell Tel. & Tel. Co., CA No. 88-1477, Order of Dismissal (D.D.C. Sept. 22, 1988).

[22] Long Distance/USA v. Southern Bell Tel. & Tel. Co., CA No. 88-1477, Order (D.D.C. Sept. 24, 1988).

[23] Defendant Centel argues that the action was improperly filed because the Commission's rules do not provide for such an "application." Centel Answer at 1. We find that the complainants' "application" was filed in a manner consistent with the requirements of the Commission's rules pertaining to formal complaints and should be treated as such. *See* 47 C.F.R. §§ 1.720 *et seq.* We decline, however, to address any claims that the complainants have attempted to assert on behalf of the uncertified class that was described in the district court suit. The Commission's rules do not allow class actions to be pursued here.

[24] Complaint at 20.

[25] *Id.*

[26] *Id.* at 28.

[27] *Id.* at 28-29.

[28] 47 U.S.C. §§ 201-206.

[29] 47 C.F.R. § 69.207.

[30] Some defendants contend that the complainants are violating Section 207 of the Communications Act, 47 U.S.C. § 207, by pursuing the damages claim separately. Section 207 provides, in

10. Most defendants[31] maintain that they do in fact assess higher CCL charges on the terminating end of the complainants' 800 calls but that they do so as required by law.[32] The defendants deny levying any unlawful charges, claim that refunds are not warranted, and argue that the complainants' 800 services are not similar to AT&T's 800 ReadyLine service.[33] In making this latter point, some defendants maintain that the complainants' services involve more than a single call or have more than two ends, thus making the *ReadyLine Orders* inapplicable. These defendants claim that calls utilizing the complainants' services have 800 service from an open originating end to a closed end at a complainant's switch, thus incurring the higher CCL charge on the open originating end against the underlying 800 provider; and that the calls are then routed from the complainant's switch, a closed end, to the called end user at an open terminating end, where the LEC assesses a higher CCL charge against the complainant as required by Commission rules. Further, the defendants contend that any credit that is due must be for the originating CCL charge under the *ReadyLine Orders*, [34] not the terminating end as claimed by the complainants, and that credit must go to the underlying 800 provider at the originating end because that carrier paid the CCL charge directly.[35]

11. Three defendants, Nevada Bell, GTE, and Hawaiian, claim that some or all of the complainants were not customers of those defendants.[36] Bell Atlantic argues that refunds are inappropriate because the Commission has eliminated access credits for WATS and 800 service.[37] NECA contends that its tariff provision regarding CCL charges is lawful.[38]

B. Miscellaneous Pleadings.

1. Motions to Dismiss.

12. Each defendant filed a motion to dismiss the complaints, and the complainants have opposed each motion. These motions generally allege that the complainants have failed to present a cause of action as required by the Commission's rules. Section 1.721(a) of the Rules requires that a formal complaint contain "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated"[39] as well as a "complete statement of facts which, if proven true, would constitute such a violation."[40] Thus, a complaint is not required to prove a violation conclusively.[41] Here, the complainants allege, *inter alia*, that the defendants have violated the Communications Act, the Commission's rules, and the *ReadyLine Orders* by assessing two higher CCL charges on each call utilizing the complainants' 800 services. A statement of supporting facts accompanies the allegations. These facts, if proven true, may constitute a violation. We conclude, therefore, that the complainants have filed valid complaints stating a cause of action as required by Sections 1.721(a) and 1.728(a) of the Commission's rules. Accordingly, we deny the defendants' motions to dismiss the complaints.[42]

---

pertinent part, that "[a]ny person claiming to be damaged by any common carrier... may either make complaint to the Commission... or may bring suit for the recovery of the damages for which such common carrier may be liable. .. in any district court of the United States...; but such person shall not have the right to pursue both such remedies." This provision of the Act is clearly intended to prevent parties from litigating the same issue in separate forums. In the instant proceeding, the complainants are not attempting to pursue identical issues both here and in court. Instead, they are asking us to determine the issue of liability and the court to determine the issue of damages. We see no inconsistency with Section 207.

[31] The issues and arguments raised by the defendants are, for the most part, identical in their essentials. For the sake of convenience, we will refer to the defendants' arguments as if they were part of the same pleading. To the extent that particular defendants raise separate or unique arguments, we will address them accordingly.

We will cite pleadings by the defendants who are Bell operating companies (BOCs) according to the name of the regional BOC, unless the pleadings were submitted separately for each individual BOC. Bell Atlantic is a regional BOC that wholly owns Bell of Pennsylvania, Chesapeake and Potomac (C&P), C&P of Maryland, C&P of Virginia, C&P of West Virginia, New Jersey Bell, and the Diamond State Telephone Company. Ameritech wholly owns defendants Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell. BellSouth owns South Central Bell and Southern Bell. NYNEX owns New England Telephone and Telegraph Company and New York Telephone Company. Pacific Telesis owns Pacific Bell and Nevada Bell. At the time the complaint was filed, Mountain States Telephone and Telegraph, Northwestern Bell, and Pacific Northwest Bell were separate entities owned by US West. Since then, the separate entities have merged, with the resulting entity being called US West Communications, Inc. *See* Mountain States Telephone & Telegraph Co., 5 FCC Rcd 1982 (Com.Car.Bur. 1990).

[32] *See* Ameritech Motion to Dismiss at 3; Bell Atlantic Motion to Dismiss at 4; BellSouth Answer at 8; Cincinnati Bell Motion to Dismiss/Memorandum at 2; Contel Answer at 9; GTE/Hawaiian Answer at 6; NYNEX Answer and Motion to Dismiss at 3-4; Pacific Bell Answer at 17; Nevada Bell Answer at 18; Southwestern Bell Motion to Dismiss and Answer at 3; US West Answer at 10.

[33] *See* Ameritech Answer at 2; Bell Atlantic Motion to Dismiss at 2-3; BellSouth Answer at 7; Centel Answer at 14; Cincinnati Bell Motion to Dismiss/Memorandum at 3; Contel Answer at 2, 4; GTE/Hawaiian Motion to Dismiss at 5; NYNEX Motion to Dismiss/Memorandum at 4; Pacific Bell Answer at 18; Nevada Bell Answer at 18; Southern New England Telephone (SNET) Answer and Motion to Dismiss at 4; United Telecommunications Answer at 3; US West Answer at 6, 9.

[34] *See* Bell Atlantic Motion to Dismiss at 4; BellSouth Answer at 7-8; Contel Motion to Dismiss at 3; NECA Answer at 4; NYNEX Motion to Dismiss/Memorandum at 5; Pacific Bell Answer at 18; Nevada Bell Answer at 19; SNET Motion to Dismiss/Memorandum at 5; Southwestern Bell Motion to Dismiss and Answer at 6; United Telecommunications Answer at 1-2.

[35] *See* Centel Answer at 21-22; SNET Motion to Dismiss/Memorandum at 5; Southwestern Bell Motion to Dismiss and Answer at 4-5; United Telecommunications Answer at 2.

[36] Nevada Bell Answer at 17; GTE/Hawaiian Motion to Dismiss at 6-7 (also admitting that 5 of the complainants were customers).

[37] Bell Atlantic Answer at 4.

[38] NECA Answer at 5-6.

[39] 47 C.F.R. § 1.721(a)(4).

[40] 47 C.F.R. § 1.721(a)(5).

[41] American Satellite Corp., 64 FCC 2d 503, 508 (1977).

[42] Ameritech and Contel filed motions to stay discovery pending disposition of their motions to dismiss the complaints.

2. Cross Complaint.

13. One defendant, Northwestern Bell, filed a cross complaint against a complainant, TeleMarketing Investments, Ltd. The cross complaint asks the Commission to order TeleMarketing to cease withholding payments for interstate switched access service provided by Northwestern Bell.[43] We decline to order the requested relief for the reasons set forth in *Illinois Bell Telephone Co. v. AT&T*, 4 FCC Rcd 5268, 5270 (1989), *reconsideration denied*, 4 FCC Rcd 7759 (1989). Sections 206-209 of the Communications Act make a carrier liable to a customer for damages that result from the carrier's unlawful actions or omissions.[44] This statutory scheme does not, however, constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment or a termination or disconnection of service until those charges have been paid. Accordingly, we dismiss Northwestern Bell's cross complaint.[45]

IV. DISCUSSION

14. We now turn to the parties' substantive claims. In asking that we declare that the defendants have unlawfully assessed two higher CCL charges, the complainants propose a decision that differs from the one adopted in the *ReadyLine Clarification Order*. There, the Bureau said that the "rule is clear on its face -- all calls that have two open ends are to be assessed only *one* higher CCL charge on the terminating end and one lower CCL charge on the originating end."[46] If, in violation of this rule, two higher CCL charges were imposed, the Bureau contemplated the adjustment of originating end charges.[47] Here, by contrast, the complainants ask us to declare that the terminating CCL charges were unlawful because it was the terminating charge that was the second and, therefore, unlawful higher CCL charge.[48]

15. First, we must decide whether a call utilizing the complainants' 800 services is a single call. If so, we must next determine whether those services' configuration is sufficiently similar to AT&T's 800 ReadyLine service to warrant application of our *ReadyLine Orders*. Finally, if these services are indeed ReadyLine-type services, we must determine how to prevent future overcharges and whether the complainants are entitled to recover past CCL overcharges. For the reasons discussed below, we find: (1) that a call utilizing the complainants' 800 services is a single call; (2) that these services are ReadyLine-type services subject to our *ReadyLine Orders;* (3) that the LECs should devise a credit mechanism to avoid assessing higher CCL charges at both ends; and (4) that in accordance with Part 69 of the Commission's rules, the complainants are entitled to reimbursement for the excessive originating CCL charges that have been assessed in the past.[49]

A. Single Call Configuration.

16. Some defendants argue that calls utilizing the complainants' 800 services are in fact two calls, one over the underlying 800 lines to a complainant's switch, and the other from that switch to the called customer, the end user. The complainants reply that such a call is, like an AT&T ReadyLine call, only one call and that the existence of an intermediate switch does not change the nature of the call.[50]

17. Courts and this Commission have consistently emphasized that they consider the end-to-end nature of communications rather than the various facilities used.[51] In a parallel case before the FCC, the Common Carrier Bureau determined that an 800 service credit card call that is routed through an interexchange carrier's switch should not be viewed as two calls and that the switch was merely an intermediate step in a single, end-to-end communication.[52] Interstate wire communication is regulated from its inception to its completion by the Communications Act and, within the meaning of the Act, does not end at an intermediate switch.[53]

18. Hence, there is an assumption that interstate communication extends from the inception of a call to its completion.[54] We are guided by that principle here. Just as Commission regulation does not end with an intermediate switch, neither does the character of a call change at a complainant's intermediate switch. After being carried over another IXC's 800 line to that switch, the call continues to its destination, regardless of any intermediate transmission facility.[55] Thus, we find that calls utilizing the complainants' 800 services, in the configuration presented to us in this proceeding, are single, end-to-end calls, unaffected by a complainant's intermediate routing switch.

Because we have denied the motions to dismiss, the motions to stay are, accordingly, dismissed as moot. Similarly, we dismiss as moot the BellSouth motion to consolidate. In addition, given our decision to grant the complaints to the extent indicated herein, we deny the motions for summary judgment filed by BellSouth, Nevada Bell, and Pacific Bell.

[43] Northwestern Bell Cross Complaint at 3-5.

[44] *See* 47 U.S.C. §§ 206-209.

[45] We note that the parties to the cross complaint have apparently engaged in discussions aimed at resolving, at least temporarily, those claims. *See* Letter of Lawrence E. Sarjeant of US West to Victor J. Toth, dated June 6, 1991; Letter of Victor J. Toth to Lawrence E. Sarjeant of US West, dated June 14, 1991. In addition, given our dismissal of the cross complaint, we dismiss as moot Northwestern Bell's accompanying conditional motion regarding filing of the cross complaint.

[46] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[47] *Id.* at 5943.

[48] Complaint at 19-21.

[49] Because we have granted the complaints to the extent indicated herein based on Part 69 and the *ReadyLine Orders*, we decline to address the other bases for the complainants' claims.

[50] Complainants' Reply to Answer at 6-9.

[51] National Ass'n of Regulatory Utility Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (hereinafter *NARUC*).

[52] Southwestern Bell, 3 FCC Rcd 2339, 2341 (Com.Car.Bur. 1988).

[53] *NARUC*, 746 F.2d at 1498; *see also* United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1944).

[54] Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977).

[55] *See* MCI v. AT&T, 369 F. Supp. 1004, 1029 (E.D.Pa. 1973).

B. The Similarity to 800 ReadyLine.

19. Most of the defendants argue unpersuasively that the 800 services at issue here are not similar to AT&T's 800 ReadyLine service in any material way.[56] While not identical in every respect, we find that these services do share such significant characteristics as two open ends and the use of an 800 line for the first leg of the call. A minor distinguishing characteristic in the complainants' service configuration is ownership of the 800 leg by a second interexchange carrier. We do not believe that this factor is sufficient to make the complainants' services materially different from ReadyLine services. We therefore find that the complainants' 800 service configuration is virtually identical to AT&T's ReadyLine configuration, except that the former involves two interexchange carriers rather than one.

C. Application of the ReadyLine Orders.

20. Because we find that the complainants' 800 services are ReadyLine-type services, the defendants' assertion that our *ReadyLine Orders* do not apply to these services is unavailing. In our *ReadyLine Clarification Order*, we specifically avoided focusing exclusively on AT&T's 800 ReadyLine service. The use of language such as "all calls that have two open ends"[57] clearly indicates that the orders apply generally to all similar services using 800 lines, including the complainants' 800 services.

D. Carrier Common Line Overcharges.

21. In its *WATS Access Charge Order*,[58] the Commission addressed whether resellers "should be required to make two carrier common line contributions -- one directly to the exchange carrier through the payment of the carrier common line charge and a second indirectly through the inclusion of that charge in the rates for the services it resells."[59] The Commission decided that although exemption from all switched access charges for WATS resellers would be unfair, "resellers should not have to make a 'double contribution' toward recovery of common line costs."[60]

22. The same basic issue of double charges raised in the *WATS Access Charge Order* gives rise to the complaints before us here. In the present case, a higher CCL charge is assessed against the carrier that provides the underlying 800 service at the beginning of the complainants' services, and that charge is presumably included in the underlying IXC's rates for 800 service to the complainants. Then, a higher CCL charge is levied at the open terminating end of the call, this time directly against the complainants. In this situation, it appears clear that the complainants currently pay two higher CCL charges, one indirectly at the originating end and the other directly at the terminating end. This payment of two higher CCL charges for a single call is squarely contrary to the Commission's prior determination that such "a 'double' contribution [of access payments] is not appropriate."[61] We apply that conclusion here.

23. Section 69.105 clearly contemplated that calls with two open ends were to be assessed only one higher CCL charge and that the charge was to be assessed on the terminating end.[62] Hence, in our *ReadyLine Clarification Order*, we concluded that it was unlawful to assess the higher CCL charge at both the originating and terminating ends of a single call, and we directed the LECs so doing to settle any overcharges with the appropriate IXCs. We decided that credit for the double contribution should come from the originating end. AT&T therefore provided lists of its calls to the originating LECs for billing credit.

24. The complainants, however, argue that credit should come from the terminating end because that is where the second and, therefore, in their view, unlawful higher CCL charge was assessed.[63] In response, most of the defendants contend that any credit for CCL overcharges must come from the originating LEC, not the terminating LEC, which must assess a higher CCL charge. The defendants are, in effect, arguing that because the complainants failed to name the defendants as originating carriers, the complaints fail to properly state a cause of action against the defendants and, therefore, should be dismissed. We agree that credit for the CCL overcharges here must come from the originating LECs. In the *ReadyLine Clarification Order*, we said that the "rule is clear on its face -- all calls that have two open ends are to be assessed only *one* higher CCL charge on the terminating end and one lower CCL charge on the originating end."[64] The complainants' failure to identify the defendants as originating carriers with respect to the specific calls at issue does not, however, necessarily preclude a finding that the defendants are liable to the complainants for CCL overcharges on the record before us. We find that the defendants who were named as terminating local exchange carriers are likely also to have been originating carriers for at least some of the calls utilizing the complainants' 800 services. We note, for example, that the defendants, with the exception of NECA, directly or indirectly provide local exchange services that cover most regions of the country. In addition, none of these defendants has explicitly denied acting as the originating carrier for at least some of the calls at issue. Under these circumstances, we find sufficient basis to conclude that the defendants are liable to the complainants for CCL overcharges to the extent that the defendants acted as originating local exchange carriers for calls utilizing the complainants' 800 services.[65]

---

[56] *See* paras. 3-5, *supra*, for a description of AT&T's 800 ReadyLine service.

[57] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[58] *WATS Access Charge Order*, FCC 86-115, Section IV.

[59] *WATS NPRM*, FCC 86-1, para. 12 & n.29.

[60] *WATS Access Charge Order*, FCC 86-115, para. 19.

[61] *WATS NPRM*, FCC 86-1, para. 12 n.29.

[62] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[63] *See* Complaint at 20.

[64] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[65] This conclusion also applies to the three defendants -- Nevada Bell, GTE, and Hawaiian -- who argued that some or all of the complainants were not their customers. *See* para. 11, *supra*. These defendants, like the others, will be liable to the complainants only to the extent that they acted as originating carriers for calls utilizing the complainants' 800 services. In other words, any of the defendants that did not act as originating carriers for these calls will bear no liability for CCL overcharges.

V. CONCLUSION AND ORDERING CLAUSES

25. For the reasons stated above, we find that the defendants have wrongfully overcharged the complainants for access, to the extent that the defendants collected higher CCL charges on the originating end of calls utilizing the complainants' 800 services.[66] The complainants have stated an intention to pursue the issue of damages in their district court action, and we therefore do not reach that issue here.

26. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complaints filed by the above-captioned complainants on October 11, 1988, ARE GRANTED to the extent indicated herein.

27. IT IS FURTHER ORDERED that the Motions to Dismiss filed by the defendants on November 30, 1988, December 6, 1988, and December 9, 1988, ARE DENIED.

28. IT IS FURTHER ORDERED that the Motions to Stay Discovery filed by the Ameritech defendants on November 30, 1988, and by Contel on December 9, 1988, ARE DENIED.

29. IT IS FURTHER ORDERED that the Motion to Consolidate filed by the BellSouth defendants on November 30, 1988, IS DENIED.

30. IT IS FURTHER ORDERED that the Motions for Summary Judgment filed by the BellSouth defendants on February 27, 1989, and by the Pacific Telesis defendants on March 10, 1989, ARE DENIED.

31. IT IS FURTHER ORDERED that the Motion to File Errata and to Add Supplemental Summary and Exhibit filed by the complainants on February 2, 1989, IS GRANTED.

32. IT IS FURTHER ORDERED that the cross complaint filed by Northwestern Bell on December 6, 1988, IS DISMISSED for failure to state a cause of action upon which relief can be granted.

33. IT IS FURTHER ORDERED that the Conditional Motion filed by Northwestern Bell on December 6, 1988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[66] We recognize that the complainants and defendants have pointed to a number of difficulties inherent in determining the originating carrier for particular calls that may be subject to some refund or damages determination. These difficulties, however, are related to the issue of damages, which is not before us in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

LONE CYPRESS RADIO ASSOCIATES, INC. — File No. BPH-880210ML

HIGHLANDS BROADCASTING CO., INC. — File No. BPH-880211MK

PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP — File No. BPH-880211ML

STODDARD JOHNSTON and SHERRIE McCULLOUGH d/b/a J & M BROADCASTING COMPANY — File No. BPH-880211MM

For Construction Permit for a New FM Station, Channel 238A, in Carmel, California

Appearances

John B. Kenkel, Esquire, and *Scott Cinnamon, Esquire*, on behalf of Lone Cypress Radio Associates, Inc.; *Patricia A. Mahoney, Esquire, Lawrence N. Cohn, Esquire*, and *Carey S. Tepper, Esquire*, on behalf of Highlands Broadcasting Co., Inc.; *Vincent J. Curtis, Jr., Esquire*, on behalf of Patricia A. Mahoney and Frank R. Jazzo, witnesses for Highlands Broadcasting Co., Inc.; *James A. Gammon, Esquire*, on behalf of Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership; *Harry P. Warner, Esquire, Mark E. Fields, Esquire, Jerrold Miller, Esquire*, and *John S. Neely, Esquire*, on behalf of Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company; and *Gary P. Schonman, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: January 7, 1992; Released: January 14, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order (HDO)*, 5 FCC Rcd 983, released February 22, 1990, the Chief, Audio Services Division designated for hearing eight mutually exclusive applicants for a new FM station on Channel 238A at Carmel, California. Four applicants remain.[1] They are: Lone Cypress Radio Associates, Inc. (Lone Cypress); Highlands Broadcasting Co., Inc. (Highlands); Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (Paso Hondo); and Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (J&M).

2. The *HDO* specified the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. A prehearing conference was held on April 30, 1990. Hearing sessions on the comparative issue were held on July 30 and 31, 1990, and August 1 and 2, 1990. At the August 2 hearing session, the record was closed except for an exhibit relating to the testimony of Alan P. Schultz. (Tr. 1214.) That exhibit (Joint Ex. 3) was received into evidence by *Order*, FCC 90M-2699, released August 28, 1990.

4. The applicants submitted proposed findings of fact and conclusions of law on October 30, 1990. Reply findings were submitted on November 16, 1990. Thereafter, as a result of petitions to enlarge issues, additional issues were added to this proceeding. Specifically, by *Memorandum Opinion and Order* of the the Presiding Judge, FCC 90M-3653, released November 19, 1990, the following issue was specified against Highlands:[2]

> To determine whether Alan P. Schultz is a real party-in-interest in the application of Highlands Broadcasting Co., Inc. (Highlands) and, if so, the effect thereof on Highlands' qualifications to be a Commission licensee.

5. Hearing conferences were held on December 13, 1990, and February 28, 1991, and further hearing sessions were held on March 4, 5, and 7, 1991. The record was again closed on March 7, 1991.

6. Proposed findings and conclusions on the added issue were filed by Highlands and Lone Cypress on April 10, 1991; and reply findings were filed by Highlands and Lone Cypress on April 24, 1991.

FINDINGS OF FACT

LONE CYPRESS RADIO ASSOCIATES (Lone Cypress)

Structure

7. Lone Cypress is a California for-profit corporation established in 1988. The three principals of Lone Cypress are Mr. L. E. (Eddie) Johnson, Jr., Ms. Judith Oates, and Ms. Olivia Alvarado. Each holds 250 shares of stock representing a 33 1/3 percent voting interest. Each is a member of the board of directors. Mr. Johnson is president, Ms. Alvarado is vice-president and chief financial officer, and Ms. Oates is vice-president and secretary. (Lone Cypress Ex. 1.)

Integration

L. E. Johnson, Jr.:

8. Eddie Johnson will serve full time as general manager of the new FM facility. His duties will include primary responsibility for long-term planning, ultimate fiscal responsibility, and implementation of the EEO program with the help of Ms. Oates who obtained the sources and filled out that portion of the application. (Tr. 399-400, 438; Lone Cypress Ex. 1, p. 1.) He will also hire an engineer and supervise the engineering at the station. (Tr. 401, 408.) Mr. Johnson will have ultimate responsibility for everything that goes on at the station, relying on input from Ms. Oates and Ms. Alvarado in the implementation of station policies and management practices. (Tr. 407; Lone Cypress Ex. 1, p. 2.) Mr. Johnson also expects to spend at least 50 percent and up to 70 percent of his time selling advertising time for the station. (Tr. 408-410.) During the time he devotes to sales, Mr. Johnson will be on the street, on the phone, or doing mailing. (Tr. 409.) In addition, Mr. Johnson may host the station's weekly public affairs program. (Tr. 412-413.)

9. Mr. Johnson is the President, General Manager, and 25 percent stockholder of Carmel Food and Beverage Company (CFBC), which owns and operates the Fabulous Toots Lagoon Restaurant in Carmel. (Tr. 424; Lone Cypress Ex. 2, 1.) He spends about 25-30 hours per week in his positions with CFBC. (Lone Cypress Ex. 2, p. 1.) He does not intend to sell his interest in CFBC if the Lone Cypress application is granted. (Tr. 423-424.) According to Johnson, a full staff is in place at the restaurant including an executive chef and a manager. Johnson has trained these people and believes the restaurant will be able to run without his direct supervision. (Lone Cypress Ex. 2, p. 1.)

10. From December 1970 until July 1975, Mr. Johnson resided within the city limits of Carmel-By-The-Sea. (Lone Cypress Ex. 2, p. 1.) For the past 15 years, his residence has been just "a couple of hundred yards" outside the city limits. (Tr. 423.) He is or has been involved with the Monterey Peninsula Chamber of Commerce, the Carmel Business Association (Board of Directors and Program Committee), the Monterey Peninsula Hospitality Association (member, Board of Directors) and the mayoral campaign of Eleanor Laiolo in Carmel. Mr. Johnson has been a businessman in Carmel-By-The-Sea for the past 20 years and, as previously noted, is presently the President and General Manager of the Carmel Food and Beverage Company, which owns and operates the Fabulous Toots Lagoon Restaurant. (Lone Cypress Ex. 2, pp. 1-2.)

11. From 1970 though 1977, Mr. Johnson was the President, General Manager and 28 percent shareholder of Monterey Bay Area Media, which was the licensee of KLRB-FM, Carmel, California. (Lone Cypress Ex. 2, p. 1.)

Judith Oates:

12. Ms. Oates, a female, proposes to work full time as the Station Manager. She will work with Mr. Johnson to oversee the day-to-day operations of the station and will serve as the station's Community Services Director and Promotions Director. (Lone Cypress Ex. 1, p. 2.) She will also work closely with the sales department and will spend about 50-60 percent of her time working in sales. By "sales," she means making sales calls in person or by phone. (Tr. 437.) She will spend approximately 20 percent of her time in production work, supervising the formation of a weekly public affairs show and serving as an on-air person. (Tr. 413, 417.) Ms. Oates will also oversee implementation of the station's EEO program that she helped formulate. (Tr. 438.)

13. Except for a one-year period when she resided in Washington, D.C., Ms. Oates has always resided in Monterey County. She lived in Prunedale, California, in Monterey County during 1978-1986. Her most recent residence, for the past four and one half years, has been in Salinas. (Lone Cypress Ex. 3, p. 1.)

14. Ms. Oates has been involved in the following activities: Member of the Salinas Valley Memorial Hospital Auxiliary as a candy striper (1961-1963); board member of the Advertising Club of the Monterey Peninsula (1983-1987); Auxiliary of Planned Parenthood of Monterey County (1983-1986); Advisory Board of Salinas Adult School (1982-present); Advertising Chair for the California International Air Show (1985); Fundraising Committee of the Steinbeck Treatment Centers (1987); Publicity Director for the California Rodeo (1977-1983); Colmo del Rodeo Parade (1983-1985); Alumnae Board of the Santa Catalina School (1971-1980); Monterey Peninsula March of Dimes and Gourmet Gala (1985); Salinas Chamber of Commerce (1969-present); and Hartnell College Community Chorus (1970-1980). (Lone Cypress Ex. 3, pp. 1-2.)

15. Ms. Oates is employed at KSMS-TV, Monterey, California, in sales. She plans to terminate her employment there in the event the Lone Cypress application is granted. Ms. Oates took classes in the Radio/TV Department at San Francisco State University, and her professional broadcast career started in 1966 when she worked in production and served as live talent at KSBW-AM/FM/TV. She was full time until 1968, then started part time in 1969 and remained there until 1977. Between 1968 and 1969, Ms. Oates worked in the production and accounting departments at KTOM-AM. She became an account executive for KWAV-FM, Monterey, California, in 1983 and stayed until 1987 when she took on a similar position at KOCN-FM, Pacific Grove, California, where she stayed until she accepted the position at KSMS-TV. In 1987, she was elected "Media Person of the Year" by the Advertising Club of the Monterey Peninsula. (Lone Cypress Ex. 3, p. 1.)

Olivia Alvarado:

16. Ms. Alvarado will be the full-time Sales Manager for the station, and her primary responsibility will be to manage the sales staff. (Lone Cypress Ex. 1, p. 3.) Although proposed as the Program Director in an integration and diversification statement, Ms. Alvarado will not really serve in that capacity. (Tr. 483-487.) The three stockholders will hire a program director, and Alvarado will oversee that department. (Tr. 456-457.) Ms. Alvarado will spend considerable time making sales calls, about 60 percent of her time.[3] (Tr. 468.) Mr. Johnson and Ms. Oates will also sell for the station. (Tr. 409, 437.)

17. Ms. Alvarado, a Hispanic-American, was born and reared in Monterey County and graduated from Salinas High School in 1971. After that, she left the county to live in the San Francisco Bay area and returned to Monterey County in 1985. Since then, she has been a member of, and involved with, the Monterey Peninsula Chamber of Commerce, the Seaside Chamber of Commerce (Community Affairs Group), the Pacific Grove Chamber of Commerce (Fund Raising), the Salinas YMCA, the Communicators of Monterey Peninsula, and the Advertising

Club of Monterey Peninsula. (Lone Cypress Ex. 4.) Employers paid her dues for the Salinas Chamber of Commerce, the Pacific Grove Chamber of Commerce, the Monterey Chamber of Commerce, and the Monterey Peninsula Ad Club. (Tr. 435, 465-466.)

18. Ms. Alvarado will terminate her other employment to meet her full-time commitment to the Lone Cypress FM station. Effective August 21, 1990, after the hearing, Ms. Alvarado started a job at KCU-TV, a Spanish television station operating on Channel 15 in Salinas, California. She had been employed as an account executive at KDOS-FM, Fremont, California, first, then KDON-FM, Salinas, California, KOCN-FM, Pacific Grove, California, and most recently KWAV-FM, Monterey, California until July 27, 1990. (Tr. 461-463; Lone Cypress Ex. 1, p. 3; Ex. 4.) By amendment filed on November 7, 1990, and accepted by Memorandum Opinion and *Order* of the Presiding Judge (FCC 90M-3868) released December 7, 1990, it was reported that Ms. Alvarado left the employ of KCU-TV and accepted new employment with KSMS-TV, Monterey, California.

Diversification

19. Lone Cypress holds no other interest in any other media of mass communications or related businesses. Individually, neither Ms. Oates nor Ms. Alvarado hold any ownership interest in any other media of mass communications. However, Mr. Johnson is an officer, director and 35 percent shareholder in Lahaina Broadcasting Co., Ltd., a corporate general partner of KPOA Radio, and, individually, is a general partner in KPOA Radio.[4] KPOA Radio is the licensee of Class A FM Station KPOA, Lahaina, Hawaii. (Tr. 402-404; Lone Cypress Ex. 1.) During the formative stages of the station (1983-1985), Mr. Johnson made several trips to Hawaii. Now, the number of trips he takes has diminished and his duties as the financial officer include no day-to-day functions. He reviews financial statements, attends an annual board of directors and shareholders meeting, and consults, by phone, concerning station business, three or four times a month. (Tr. 403, 411.)

Auxiliary Power

20. Lone Cypress will provide auxiliary power at the studio and transmitter locations. (Lone Cypress Ex. 5.)

HIGHLANDS BROADCASTING CO., INC. (Highlands)

Structure

21. Gilbert Wisdom (Wisdom) is the sole officer and director of Highlands, and he owns 100 percent of its stock (*i.e.*, 1,500 shares). (Highlands Ex. 1, p. 1.)

Integration

22. If the Highlands application is granted, Wisdom proposes to work at the station as full time general manager. In that capacity, he will have ultimate authority and responsibility for all departments at the station, and he will have ultimate responsibility for establishing and implementing all station policies and procedures. (Tr. 501-502; Highlands Ex. 1, p. 1.)

23. Since January 1987, Wisdom has lived within the principal city contour of Highlands' proposed station. From January 1986 to January 1987, Wisdom lived within the Carmel city limits. In the event Highlands' application is granted, Wisdom proposes to move within the city limits of Carmel. (Highlands Ex. 1, pp. 1-2.)

24. Wisdom seeks credit for being both a Hispanic and an American Indian. His Hispanic claim is based upon representations that he is one-eighth Hispanic (Mexican) heritage by blood, and that he has a functional knowledge of the Spanish language, owns a 50 percent ownership interest in a home in Mexico, and contributes to charitable activities in Mexico. (Highlands Ex. 1, p. 2.) He has never visited the place in Mexico from which he claims his Mexican ancestor emigrated. He can speak some Spanish, but is not fluent in the language. For relaxation, he visits property which he and his ex-wife own in Tijuana, Mexico. (Tr. 494, 530.) When in Tijuana, he drops off clothing at an orphanage supported by a Los Angeles-based organization, Los Hambriados. (Tr. 530.) Wisdom has not retained full membership in Los Hambriados since 1980, when he ceased participating in its formal activities, but he continues to make contributions to the orphanage. (Tr. 526.) In 1990, he contributed $50 and some clothing. (Tr. 533.) Wisdom is not a Hispanic surname. (Tr. 682-683.)

25. Wisdom's American Indian claim is based on representations that he is one-eighth American Indian (Cherokee) by blood. He acknowledges that he is not and has never been active in Indian civic activities and has never made substantive affirmative steps to participate in or to associate with an Indian heritage. (Highlands Ex. 1, p. 2.) He does not speak any Native American dialects. He has never visited Cherokee reservations. He does not contribute money to any American Indian activities, nor subscribe to any magazines or newspapers published on behalf of American Indians. (Tr. 534-535.) He has never checked to see if he is on any tribal roll of the Cherokee nation. (Tr. 670.) He has never been issued a document from the Bureau of Indian Affairs identifying him as an American Indian. (Tr. 671.) Wisdom describes himself as "fair-complexioned" and thinks it unlikely that a stranger would identify him as either an American Indian or a Hispanic. (Tr. 683.)

26. Wisdom is a member of the Monterey Peninsula Chamber of Commerce (1985-present), member of the Ad Club of Monterey Peninsula (1986-1988),[5] member of the board of directors of the Monterey Peninsula Jazz Orchestra (non-profit organization devoted to educating youth) (1989-present), and member of the Talent Advisory Committee, Monterey Blues Festival, non-profit organization devoted to youth programs in black community (1989). (Highlands Ex. 1, p. 3.)

Diversification

27. Wisdom owns 83.3 percent of Wisdom Broadcasting Company, Inc. (WBCI), licensee of Station KRML(AM), Carmel, California. (Tr. 504; Highlands Ex. 1, p. 3.) Wisdom's co-stockholder in WBCI is Alan P. Schultz (Schultz) who owns 16.7 percent of the company and is also a corporate officer and director. (Tr. 683-684.) The relationship between Schultz and Wisdom will be considered in greater detail under the real party-in-interest issue.

28. Schultz loaned Highlands $1,500 which was evidenced by a Convertible Promissory Note dated February 4, 1988. The Note, payable on February 1, 1995, gave Schultz the right to convert the Highlands obligation into 1,500 shares of Highlands Class B common (non-voting) stock. (Tr. 509; Lone Cypress Ex. 6; Joint Ex. 3,

pp. 43, 49.) This would have represented a 50 percent ownership interest. (Joint Ex. 3, p. 8.) Pursuant to Section 5 of the Note, Highlands (Wisdom) could not prepay the loan without the prior written consent and approval of Schultz. (Lone Cypress Ex. 6.) The Note remained outstanding until it was "Cancelled 6/25/90 as of 6/21/90" on advice of counsel, just days before Mr. Wisdom's scheduled deposition in this proceeding. (Tr. 542.) Highlands paid Schultz the amount due, plus interest, on June 21, 1990. (Tr. 510, 693; Joint Ex. 3, pp. 30-31.)

29. As noted, Wisdom owns 83.3 percent of WBCI, licensee of KRML in Carmel. Wisdom made a pledge to sever all connections with Station KRML and with the licensee of the station in Highlands' application as initially filed on February 11, 1988, if Highlands' application is granted. Wisdom remains committed to fulfilling that divestiture commitment. (Highlands Ex. 1, p. 4.)

30. Wisdom currently owns 20,000 shares of WBCI stock, and Schultz owns 4,000 shares. (J&M Ex. 4, p. 1.) Schultz loaned WBCI $16,000, and the obligation to repay this loan is the subject of a Convertible Promissory Note dated October 1, 1985. (Lone Cypress Ex. 7.) The Note is outstanding at this time. (Tr. 519.) The Note allows Schultz to convert the WBCI obligation to him into additional shares of WBCI stock which represent 40 percent of the company (*i.e.*, 16,000 shares[6]). After the conversion, Schultz would own 50 percent of WBCI. (Tr. 519-521; Lone Cypress Ex. 7; J&M Ex. 4, Sections A and B.)

31. Wisdom and Schultz have a Buy-Sell Agreement dated July 1, 1985, regarding their interest in WBCI. The Buy-Sell Agreement restricts the transfer of shares by either shareholder by providing that no shares of WBCI may be transferred without providing written notice to WBCI and giving WBCI or the remaining shareholder the right to acquire the offered stock on the same terms and conditions as those in the proposed transfer. (Tr. 514; J&M Ex. 4, pp. 1-2.) They also executed an Amendment No. 1 to Buy-Sell Agreement dated February 4, 1988. (Lone Cypress Ex. 8, pp. 1-2.) Section 1.2 of that amendment defines an "FCC Mandated Divestiture Transaction" as "any disposition of an ownership interest in the Company required by the FCC as a result of either or both of the Shareholders acquiring, or proposing to acquire, an interest in any other radio station or any other media related activity." Under Section 1.1(a) of the Amendment, in the event of an FCC Mandated Divestiture Transaction, and the potential sale of stock of WBCI, Schultz is required to convert the amount then due on the $16,000 WBCI note into shares of WBCI stock. (Lone Cypress Ex. 8, P. 1, Section 1.1(a).) At that point, Wisdom and Schultz are both required to "sell all of their shares to the prospective purchaser . . " (Tr. 516; Lone Cypress Ex. 8, p. 1, Section 1.1.(b).) In the event of a sale of WBCI's assets (rather than stock), Schultz is authorized by Section 2 of the Amendment to delay the conversion until after WBCI's assets have been sold.

32. According to Wisdom, the purpose of the amendment to the Buy-Sell Agreement was to assure that in the event of an FCC Mandated Divestiture Transaction (*e.g.*, the need to effectuate Wisdom's diversification commitment), Schultz would not be able to block a sale of the station. (Tr. 524-525.) Schultz also acknowledged that under the amendment, if Highlands' application were granted, both he (Schultz) and Wisdom were required to dispose of their interests in WBCI. (Joint Ex. 3, p. 50.)

Auxiliary Power

33. Highlands intends to install auxiliary power supply at both the proposed transmitter and the studio site. (Highlands Ex. 2.)

Real Party - in - Interest Issue

34. In 1985, Wisdom and Schultz formed WBCI, a California corporation, which acquired radio Station KRML-AM in Carmel, California. Wisdom's ownership interest in WBCI was, and has always been, 83.3 percent. Alan Schultz has always owned 16.7 percent of WBCI. (Highlands Exs. R-1, R-2.)

35. When Wisdom and Schultz purchased KRML-AM, Wisdom had no prior experience in broadcasting. Because of his inexperience, Wisdom regularly sought Schultz' advice and input regarding the day-to-day operations of KRML-AM during the approximately first 12 months of WBCI's ownership of the station. (Highlands Exs. R-1, R-2.) After his initial involvement in the management and operations of KRML-AM, Schultz gradually and continually became less involved in station operations. Between 1985 and the beginning of 1988, Schultz visited Carmel about 60 times. It was understood at the outset that Wisdom would manage KRML-AM, and that Schultz would continue the pursuit of his broadcast management career in the San Francisco area. (Highlands Ex. R-1, p. 1.) Since 1985, it was estimated that Schultz has worked only 100 days at KRML-AM. In the past two years, he has not worked there at all. Schultz has never drawn a salary from WBCI. Since the time WBCI purchased KRML-AM, Schultz never considered himself a day-to-day manager of the station. (Tr. 1598.)

36. KRML-AM has never turned a profit since WBCI purchased it in 1985. (Tr. 1602.) The station has been for sale since 1987. (Tr. 1467.) According to Schultz, he has wanted WBCI to sell the station for a long period of time. (Tr. 1602.) Schultz believes that the radio market of which Carmel is a part is over saturated. (Tr. 1596.)

37. As a result of a discussion between Wisdom and Schultz, the idea about seeking an FM channel at Carmel was formed. (Tr. 1594.) According to Wisdom, Schultz "gave birth to that idea" and, because Wisdom lacked experience in such matters, Schultz took the first step in asking KRML-AM's engineering consultant to perform an FM channel study. (Tr. 1416, 1594.) WBCI paid for the engineering study. WBCI filed a "Petition for Rule Making" requesting the allocation of Channel 238A to Carmel, California. (Tr. 545; Highlands Ex. R-1, p. 2; Highlands Ex. R-2, p. 1.) A *Notice of Proposed Rule Making*, 2 FCC Rcd 1521, was released March 11, 1987, and a *Report and Order* (*R & O*), DA 87-1688, allocating the channel to Carmel was released on November 25, 1987. (Lone Cypress Ex. R-1.) Copies of the *R & O* were mailed by WBCI's attorney, Frank Jazzo, of Fletcher, Heald and Hildreth, to both Schultz and Wisdom.

38. On November 4, 1986, Frank Jazzo, attorney for WBCI, wrote a letter to Alan Schultz addressing the question of whether, with AM station KRML, WBCI would be entitled to the Commission's "AM Daytimer's Preference" in any FM comparative hearing for Carmel. Jazzo's conclusion was that WBCI would not qualify for the preference. (Lone Cypress Ex. R-2.) Mr. Jazzo prepared the letter in response to an inquiry from Mr. Schultz. (Tr. 1685.) It was Mr. Jazzo's policy to address his responses to inquiries to whomever made the inquiry. (Tr. 1687.) Ear-

ly on, in 1986, Schultz was in agreement with Wisdom that WBCI should pursue the FM allocation and when the FCC released its *R & O* allocating an FM channel to Carmel in November 1987, it was still WBCI's intention to file an FM application. (Tr. 1420-1421.)

39. As noted, initially it was the intention that the FM application for Carmel would be filed in the name of WBCI. However, according to Wisdom and Schultz, the plan to have WBCI file the application changed. One reason why WBCI did not pursue the FM application was its ineligibility for a Daytimer's Preference. (Tr. 1429-1431.)[8] However, WBCI's ineligibility for a Daytimer's Preference was not a decisive factor as far as Schultz was concerned. (Tr. 1496.)[9] Schultz had other business and personal reasons for not wanting to proceed with the FM venture. First, he reached the conclusion that the Carmel area is saturated with radio signals -- about 90 signals serve Carmel, half of which are FM's. Second, Schultz believed that there would be great competition for the Carmel FM facility, that the proceeding would be lengthy, and the costs of pursuing the facility would be prohibitively high. This he wanted no part of. According to Schultz, he tried to temper Wisdom's enthusiasm for applying for the FM facility, but to no avail. (Tr. 1505, 1596.) Finally, Schultz' time constraints, financial limitations, and promising broadcast management position with Douglas Broadcasting dissuaded Schultz from involving himself in the ownership or management of an FM facility in Carmel.[10] Schultz acquired stock options in Douglas Broadcasting in May 1989. These options are conditioned upon continued performance criteria and have not been exercised as of yet. (Highlands Ex. R-2, p. 2.)

40. According to Jazzo, Wisdom and Schultz were equally interested in the FM allocation from the time the petition for rule making was filed by WBCI until late January 1988. The first time it became absolutely evident to Jazzo that an entity other than WBCI would be applying for the new FM station in Carmel was when he prepared a letter for Mr. Wisdom on January 29, 1988, which transmitted a draft of the FM application form to Wisdom with a copy to Schultz. The first two sentences of the transmittal letter are as follows: "Please find enclosed a draft of the Carmel FM application on FCC Form 301. Obviously, some information will need to be provided with respect to the new corporation." (Tr. 1688-1689, 1721; Lone Cypress Ex. R-5.) At that time, Jazzo did not know the name or composition of the new corporation. (Tr. 1719.)

41. According to Schultz, sometime in mid-1987, he informed Wisdom that he was no longer interested in pursuing the Carmel FM facility, but Wisdom places this conversation around Christmas of 1987. (Tr. 1498-1499.) Schultz told Wisdom that he did not want to detract from his existing employment duties with Douglas Broadcasting. (Tr. 1420.) According to Schultz, by the time the Highlands application was filed, he no longer had any interest in participating in that entity. (Tr. 1593.) It was Jazzo's understanding that Schultz would only participate as a lender and did not want any part of Highlands because he had no desire to participate in day-to-day operations. (Tr. 1700, 1709-1710, 1720.)

42. By December 1987, Wisdom had decided to apply for the FM facility alone. According to Wisdom, it was also understood at that time that Schultz might assist him solely as a lender, and that Schultz would have no role in the preparation of the application, the proposed management of the station, or in any other aspect of the prosecution of the application. (Tr. 1450.)

43. The last conversation Jazzo had with Schultz regarding the Carmel FM application was in early February 1988. Wisdom was also conferenced into the conversation. The nature of the conversation was that Wisdom had decided to form Highlands and file an application under the Highlands name. Schultz indicated during this conversation that he had agreed to loan funds to Highlands. (Tr. 1691-1692.) Although Jazzo had subsequent conversations with Schultz regarding KRML-AM, from that point on (the conclusion of the early February 1988 telephone conversation), Jazzo believed that Schultz was merely a lender to Highlands. (Tr. 1699-1700, 1710, 1720.)

44. Dave Williams was the Highlands engineer, and he was retained by Wisdom. (Tr. 1448.) At the time Williams was preparing the engineering portion of what came to be the Highlands application, he assumed that both Wisdom and Schultz were principals of the applicant entity. At the time the Highlands application was being prepared, no one told him exactly who the principals of Highlands were. Thus, the fact that Schultz was sent copies of certain letters generated from Williams regarding Highlands was due to Williams' unawareness of the identity of Highlands' principal. (Highlands Ex. R-3, 2.)

45. Schultz had no role in the preparation of the Highlands application. All of the engineering services with respect to the Highlands application were billed to Highlands and subsequently paid by Highlands. With some assistance from the engineer, Wisdom prepared a cost of construction and initial operations budget. Wisdom contacted potential sources of financing and obtained written financial commitments from some of these people. (Highlands Ex. R-1, pp. 2-3.) Wisdom's wife, Judith Garber, has loaned Highlands money towards the prosecution of the application. (Tr. 1442, 1445; Lone Cypress Ex. R-4.)

46. Wisdom arranged for KRML-AM's communications counsel, Frank Jazzo, Esquire, to prosecute Highlands' application. With assistance from Jazzo and his associates, Wisdom prepared the FCC Form 301 application, secured the transmitter site, and set up the Highlands' public file. (Highlands Ex. R-1, p. 3.) Jazzo's law firm sent Highlands' retainer/fee agreement to Wisdom. (Tr. 1725.) Subsequently, it was Wisdom who terminated Jazzo and his law firm, and it was Wisdom who retained new counsel. (Tr. 1465.) Sometime around February 1988, Wisdom asked Schultz if he could serve as a possible source of funding for Highlands' application. Schultz subsequently agreed to assist Wisdom as a lender. (Highlands Ex. R-2, pp. 2-3.)

47. Schultz has made loans periodically to assist Wisdom in the prosecution of Highlands' application. The first such loan, in the amount of $1,500, was made on February 4, 1988, and is evidenced by a Promissory Note with a convertible stock option. The facts relating to this Note are set forth in paragraph 28 of these Findings.

48. There is some conflicting testimony concerning whose idea it was to utilize a Promissory Note with the convertible stock option. According to Wisdom, the idea was germinated by Frank Jazzo's law firm, and that counsel then coordinated his efforts with Highlands' local California counsel. (Tr. 1480.) Wisdom was never told by Schultz that he wanted a convertible stock option, only that he wanted security. Wisdom thought that Frank Jazzo suggested the stock option. (Tr. 1469, 1471.)

49. Schultz does not recall how the Promissory Note came into being. (Tr. 1591.) He never made any suggestions as to what form of security he wanted, nor does he know why 1,500 shares of Highlands stock are referenced in the Note. (Tr. 1600.) Although instructions were given to the attorneys to create some written form of security, the specific structure of the Promissory Note was not Wisdom's idea. (Tr. 1482-1484.) Schultz believes that Wisdom talked to counsel and asked them how best to proceed to cover the loans Schultz would make. (Tr. 1574.) Although Frank Jazzo agreed that the Promissory Note was created because Schultz wanted security for his loans, Jazzo stated he believed that Wisdom, Schultz, and local counsel together came up with the stock convertibility idea. (Tr. 1696, 1711.) Nevertheless, Jazzo talked to local counsel about the Note and offered some language to be included so that the non-voting stock referred to in the stock option would provide proper insulation under the Commission's policies. (Tr. 1714.) As far as Schultz was concerned, the Note itself would have been sufficient to provide the security he wanted. He did not create the structure of the Note, but when Wisdom presented it as the form of security for the Schultz loans, he didn't argue with it. (Tr. 1576-1578.)

50. In addition to the first loan made by Schultz to Wisdom, which was secured by the Promissory Note and convertible stock option previously discussed, Schultz later made other loans to Highlands. These loans were made on a "handshake" basis without any security. Specifically, Schultz loaned Highlands $100 on October 5, 1989; $1,650 on April 26, 1990; and $5,000 on May 10, 1990. (Tr. 1438; Lone Cypress Ex. R-3.)[11] Repayment terms for the other three outstanding "handshake" loans were neither discussed nor were the loans memorialized, except for the check stubs in Mr. Schultz' checkbook. (Tr. 1582-1583.)

51. At the suggestion of Schultz, the Promissory Note was cancelled on June 25, 1990. (Tr. 1584-1585; Lone Cypress Ex. 6.) When Highlands obtained new counsel, counsel reviewed the documentation and suggested, through Wisdom, that the Note was going to be misinterpreted in the comparative process, in a way that could be detrimental to the application. Due to the opinion of Highland's new counsel, Schultz suggested that the debt be paid off, with interest, pursuant to the terms within the Note. Wisdom agreed to do this. (Tr. 1585; Highlands Ex. R-1, p. 4.)

52. Sometime prior to or around the time of the filing of Highlands' application, Wisdom, Schultz and Ed Hogan or Eddie Johnson attended an informal settlement meeting in a Carmel area restaurant, the entire agenda of which was unknown to Schultz prior to his arrival there. At that time, there was a discussion of a possible merger structuring of certain Carmel FM applicants. The proposed plan included combining the FM operations with KRML-AM. Schultz did not participate in any of the discussions regarding the terms of the merger as between the FM applicants. The extent of Schultz' participation was limited to the scenario which would combine the operations of KRML-AM with the new FM station. Because Schultz is part owner of KRML-AM, he was directly affected by the deal and, thus, attended the meeting. (Tr. 1463; Highlands Ex. R-2, p. 3.)

PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP (Paso Hondo)

Structure

53. Paso Hondo is owned 20 percent by its sole general partner, Kenneth Hildebrandt, and 80 percent by its sole limited partner, George Newhart. (Paso Hondo Ex. 1.)

Integration

54. Paso Hondo does not propose any integration. (Paso Hondo Ex. 1.)

Diversification

55. Neither Paso Hondo nor its principals have any attributable interests in any medium of mass communications. (Paso Hondo Ex. 1.)

STODDARD JOHNSTON and SHERRIE McCULLOUGH d/b/a J & M BROADCASTING COMPANY (J & M)

Structure and Organization

56. J&M is currently a general partnership. Stoddard Johnston (Johnston) and Sherrie McCullough (McCullough) are each 50 percent general partners in J&M. (Tr. 727; J&M Ex. 1.) J&M operated under an oral partnership agreement from on or about January 5, 1988, until on or about May 1, 1990, when the partnership agreement was reduced to writing and executed by Johnston and McCullough. However, Johnston and McCullough intend to form a corporation which will be the permittee/licensee of the station, which they will own on a 50/50 basis. (Tr. 730-731.) It has always been their intention to operate their station in the corporate form. (Tr. 759, 806.)

57. Johnston was informed of the availability of the FM channel in Carmel by his counsel. (Tr. 722.) He called McCullough, whom he had known for more than ten years, and asked her if she would be interested in joining with him in applying for the station. (Tr. 722-723, 725.) McCullough has been married for ten years to Tom McCullough, a stock broker. (Tr. 725.) Johnston and McCullough met together with their respective spouses on January 5, 1988, and discussed this opportunity. (Tr. 723.) McCullough was interested, and within the next few days agreed to join Johnston in a partnership to prepare and file the application. (Tr. 723-724.) Prior to coming to an agreement, Johnston had briefed McCullough on the application process and his estimate of the total expenses, including construction and first three months operating costs. (Tr. 725-726, 735.) Ms. McCullough has kept Mr. McCullough informed of the project because, as a married person, she wanted to get some sort of feeling from her spouse to go ahead with a project of this type. (Tr. 810.) Sherrie McCullough will rely on community property for her financial contributions to the application, although she believes she has sufficient assets in her own name to cover construction and prosecution costs. (Tr. 804, 840, 842; Cal Tower Ex. 14.) At deposition, Ms. McCullough testified that she looked upon the application as a joint effort with her husband, but clarified this to mean only financially. (Tr. 833; Cal Tower Ex. 14.)

Integration

Stoddard Johnston:

58. Johnston will serve as the General Manager of the proposed station working full time on a daily basis -- a minimum of 40 hours per week. (Tr. 737; J&M Ex. 2, p. 1.) Johnston will have overall responsibility for all aspects of the proposed station's operations including the shaping of entertainment, news and public affairs programming. He will have overall responsibility for the hiring, firing, and supervision of station personnel except the sales department; this includes the hiring, firing, and supervision of on-air personnel and production personnel. Johnston will hire a program director who in turn will hire, fire, and supervise on-air and production personnel with Johnston's input and approval. Johnston will make sales calls and from time to time will accompany other sales employees on their sales calls. Johnston will have overall responsibility for the station's budget and developing station policies. (J&M Ex. 2, p. 1.)

59. Johnston presently has no business commitments. He will resign any employment he may have before the Carmel station begins broadcasting, so as to be competely free to devote full time to the station. (J&M Ex. 2, p. 1.)

60. Johnston has resided in Carmel, California, from 1964 through 1988, when he moved to Pebble Beach, California. Pebble Beach is in the unincorporated area of Monterey County and is immediately adjacent to Carmel. His home is approximately one mile from the Carmel city limits. For the past 26 years he has resided within the proposed 70 dBu contour of the proposed station. (J&M Ex. 2, p. 1.)

61. Johnston began working in the engineering department of WCHS(AM), Charleston, West Virginia, in 1937 and remained there until 1941. He was the business manager of Ivy Network in New Haven, Connecticut, from 1947 to 1948 while attending college, and from 1949 to 1950 was the Chairman of Yale Broadcasting Company, owner of WYBC(AM) in New Haven. Between 1950 and 1951, he was an account executive at WTAM(AM)/WNBK(TV), Cleveland, Ohio. From 1954 to 1958, he was general sales manager of KLX(AM), Oakland, California; and from 1958 to 1961, account executive for station KTVU(TV) in Oakland. Between 1961 and 1964, he was president and general manager of KRGV-AM-TV in Weslaco, Texas. While in Monterey, California, from 1964 to 1968, Johnston maintained the title of both president and general manager at KMBY(AM); and he was president and general manager at KWAV(FM), Monterey, California, from 1966 to 1975. In 1975 and up until 1980, he continued to hold the title of general manager at KWAV(FM) in Monterey, California; and from 1981-1985, he was president and general manager of KMBY(FM) in Seaside, California. (J&M Ex. 2, pp. 2-3.)

62. Johnston has served as president of the Society for the Prevention of Cruelty to Animals of Monterey County from 1986 to date, devoting six hours per week to that organization. He has been on the board of directors since 1967 and has served as president of Pacific Grove-Asilomar Operating Corporation since 1974, devoting about six hours per week to that activity. Asilomar is owned by the California Department of Parks and Recreation and is a low-cost, self-supporting public conference and meeting center, hosting more than 200,000 people yearly. (J&M Ex. 2, p. 3.)

63. Johnston has also been a member (ad hoc) of the Advisory Council of the Monterey County Symphony in Carmel, California, from 1976 to the present, devoting three hours per year, but none recently. He is also a member and past director of the Monterey Peninsula Rotary Club since 1966 to the present; a member of the Carmel Business Association; and a board member of the Monterey Peninsula Chamber of Commerce. He devotes almost no time to these organizations at the present time. (Tr. 742-743.) He is past board member of the Community Foundation for Monterey County and served as its president for two terms during the years 1978 through 1984, working six hours per week. (J&M Ex. 2, p. 4.)

64. From 1980 to 1984, Johnston was board member of Economic Development Corporation of Monterey County, working four hours per week, and serving as its first president. He continues to attend monthly meetings of this group. He was also past board member of the Monterey Bay Girl Scout Council, serving two terms as its president from 1968 to 1974. He also was a board member of the Monterey Peninsula Museum of Art and held board membership to Monterey County Red Cross for two terms, from 1966 through 1970. (J&M Ex. 2.)

65. Johnston retained J&M's attorney, selected the engineer, obtained permission to use the transmitter site, established the local public file, and receives all bills for the partnership. (Tr. 767, 803, 812, 819.) The applicant's post office box is Johnston's, and Ms. McCullough does not have access to it. (Tr. 820.) McCullough assisted in the preparation of the EEO portion of the application and the exhibit that accompanied the application reflects the input of both principals. (Tr. 819.)

Sherrie McCullough:

66. McCullough will serve as the station's sales manager/public affairs director. She will work full time on a daily basis -- a minimum of 40 hours per week. She will supervise and set policy for the Sales Department and directly supervise, hire, and fire the staff in that area. As the Public Affairs Director, she will supervise the creation and production of the station's public affairs programming and will be the station's liaison with the local community. (J&M Ex. 3, p. 1.) In the Sales Department, McCullough will have ultimate responsibility for all activities, but Johnston's input will be available. (Tr. 798.) McCullough will make sales calls, and she may request Johnston to also make sales calls. (Tr. 799.) In the event of a disagreement, McCullough will have the final say in the Sales and Public Affairs Departments, while Johnston will have the final say in the other departments. (Tr. 801-802.)

67. McCullough is an American of Japanese descent. In 1950, she moved with her family to within the proposed service area of the station, and has lived in the service area continuously to the present, except for the two years from 1980 to 1982. (J&M Ex. 3, p. 2.)

68. McCullough joined the Monterey County Society for Prevention of Cruelty to Animals (S.P.C.A.) Board in 1982, and stayed active for six years. During this period, she was a volunteer with the Monterey Peninsula Chamber of Commerce. She was chairman for the Chamber's annual membership drive and joined the Board of Directors for six years. During those six years, she held various positions as treasurer, vice-president, and in 1988 was elected president. At the present time, McCullough is not

on the Board, but is still involved, chairing the live auction committee for its first auction, and serving on the nominating committee. (J&M Ex. 3, pp. 4-5.)

69. McCullough is vice-president of the Board of Directors of the Monterey County Symphony Association. She oversees its fund development and marketing committees, serves on its nominating and search committee, and has participated in fund raising activities for the symphony. She is involved in the United Way of the Monterey Peninsula, joined the Board of Directors in 1989, and was the 1990 Campaign Chairman. (J&M Ex. 3.)

70. In 1989, McCullough was on the March of Dimes Gourmet Gala Committee and was chairman of the silent auction committee. She has helped in the American Cancer Society's "Jail and Bail" and the Monterey Institute of International Studies gala. (J&M Ex. 3, p. 6.)

71. Stoddard Johnston and Sherrie McCullough did not initially sign a written partnership agreement. (Tr. 731.) On May 1, 1990, Sherrie McCullough wrote a one-page letter to Stoddard Johnston, which he countersigned, commemorating their oral partnership arrangement. (Cal Tower Ex. 13.) They decided to proceed as an oral general partnership prior to a grant of the application in order to avoid both the cost of incorporating and the cost of preparing a written partnership agreement. (Tr. 731.) As already noted, it has always been their intention to form a corporation if J&M prevails in this hearing. (Tr. 759.)

Diversification

72. Other than the J&M application, neither the applicant nor its principals or their spouses, have any interest, either directly or indirectly, in any medium of mass communications. (J&M Ex. 1.)

Auxiliary Power

73. J&M will install and maintain auxiliary power generation facilities at both its studio and transmitter sites so that the station may remain on-the-air continuously in the event of a commercial power failure at either or both locations. (J&M Ex. 1, p. 1.)

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

74. Four applicants remain in this proceeding. With the exception of Highlands Broadcasting Co., Inc. (Highlands), there are no basic issues outstanding with respect to the remaining applications. Highlands must meet a real party-in-interest issue relating to Alan Schultz' alleged involvement in the Highlands application. Because only basically qualified applicants are entitled to comparative consideration,[12] the real party-in-interest issue will be resolved before the comparative issue is addressed.

75. An issue was specified to determine whether Schultz is a real party-in-interest in the Highlands application. The Commission considers an individual a real party-in-interest if such person has an ownership interest or will be in a position to control, actually or potentially, the operation of the station. *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7008, (1987); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (1983). While it appears that originally Schultz and Wisdom intended that WBCI would be the applicant for the FM station, these plans changed, and only Wisdom decided to pursue the FM proposal under Highlands, a new corporation he formed for the purpose of prosecuting the FM application. Thus, the Findings reflect Schultz' early involvement in the effort to have the Commission allocate the FM channel to Carmel. But, after the decision was made that Wisdom alone would pursue the FM application as Highlands, Schultz' role in the prosecution of the application was only that of a lender. Thus, Schultz had no role in the preparation of the application; he did not retain the engineer; he did not prepare the cost estimates or arrange for financing. Moreover, Schultz' time commitment to his employer, Douglas Broadcasting, and his management duties precluded his involvement in the FM proposal. There is no evidence that Schultz has an ownership interest in Highlands, a corporation wholly owned by Wisdom. Nor do the fundings suggest that Schultz is or will be in a position to control the operation of the station. His role as lender does not place him in a position to control the operation of the FM station.

76. Lone Cypress argues that Schultz should be held a real party-in-interest in the Highlands application and cites several factors to support its position. Thus, Lone Cypress argues that Schultz was the individual who had the idea to have an FM channel assigned to Carmel; that WBCI, owned partially by Schultz, originally intended to file for the channel; that Schultz inquired about a possible Daytime Preference; that although Schultz stated that his interest in applying for the FM channel ended, Lone Cypress challenges this by referring to the FM convertible Note (which would have given Schultz a 50 percent non-voting interest in Highlands) and the money Schultz loaned Wisdom to prosecute the application. Finally, Lone Cypress argues that it is implausible for Schultz not to want to own an FM station in Carmel instead of an AM station.

77. There is no question but that Schultz early on was interested in pursuing an FM station in Carmel, as noted by Lone Cypress.[13] This was evidenced by the fact that Schultz originated the idea of seeking the allocation of an FM channel for Carmel; that it was intended that WBCI would be the applicant; and that Schultz inquired regarding the Daytime Preference. But, once Schultz decided not to pursue the FM station, he did nothing to indicate he was a real party-in-interest. His participation was that of a lender. And, while his loans were secured by a convertible Note which could have resulted in Schultz becoming a holder of non-voting Highlands stock, this Note was cancelled.[14] Thereafter, Schultz had no right to acquire an interest in Highlands. Thus, Loan Cypress' reliance on the FM convertible Note to establish that Schultz is a real party-in-interest is misplaced. Once the Note was cancelled, Schultz' only involvement with Highlands was to make small loans to Wisdom. Such activity does not make Schultz a real party-in-interest in Highland's FM application.

78. Finally, Loan Cypress' argument, that it is implausible for Schultz not to want an FM station in Carmel, instead of the AM station which he and Wisdom own, is not persuasive because this argument ignores the fact that Schultz has been trying to sell the AM station. Thus, Schultz does not want to own any radio station in Carmel, not an AM or an FM. Schultz has adequately explained why he decided not to pursue the FM channel. Both Schultz and Wisdom testified at length regarding this issue and appeared to be forthcoming in providing information relevant to their dealings, not only involving the FM station application, but also the AM station and WBCI. In

view of the foregoing,[15] it is concluded that Schultz is not a real party-in-interest in the Highlands application, that Highlands is not disqualified, and that Highlands is entitled to comparative consideration in this proceeding.

79. In its 1965 *Policy Statement on Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.[16]

80. Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (Paso Hondo) and Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (J&M) have no attributable media interests under the diversification criteria. Neither does Highlands, although arguments are made that Wisdom will be unable to dispose of his interest in the Carmel AM station. In this connection, Wisdom proposed to divest himself of the Carmel AM station. However, because there were tax liens outstanding against the AM station, it is argued that such liens would be an impediment to Wisdom's ability to sell the station. The short answer to this is that the liens have since been satisfied. They no longer constitute a possible impediment to Wisdom's sale of the station. But even if they still existed, there is no showing that these liens would be treated any differently than a mortgage so as to preclude a sale of the AM station. The liens would have been satisfied out of the proceeds of the sale. It has not been shown that Wisdom will be impeded in his ability to dispose of the AM station. Thus, no diversification demerit against Highlands is warranted.

81. Lone Cypress has no other media interests. But, L. E. Johnson, its 33 1/3 percent owner has a significant ownership and management position in another FM station. Specifically, Mr. Johnson is a general partner and owner of a 35 percent attributable interest in the license of FM station KPOA(FM), Lahaina, Hawaii. None of the remaining general partners (or shareholders in the corporate general partnership) own a larger interest in KPOA(FM). Mr. Johnson's ownership interest in KPOA is active. He is regularly consulted concerning the station, and he takes an active role in its affairs. However, because the Hawaii station is located 2,000 miles from Carmel, and because Johnson does not have a majority ownership interest in either the Hawaii station or Lone Cypress, only a slight diversification demerit is warranted. *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990); *Joseph Bahr*, 92 FCC 2d 114 (1982).

82. Under the best practicable service to the public criteria, the Commission considers the extent to which the owners of the proposed station will be integrated into the management of the station and the qualitative attributes of the participating owners. Such qualitative factors include minority ownership and participation, local residence, civic involvement, and, of lesser importance, past broadcast experience.

83. Lone Cypress, Highlands, and J&M each claim 100 percent integration credit. Paso Hondo seeks no integration credit in this proceeding and is entitled to none. However, there are various arguments advanced that the applicants seeking 100 percent integration credit are not entitled to such credit.

84. Lone Cypress seeks 100 percent integration credit on the basis of the proposal to integrate full time its three equal owners, Johnson, Oates, and Alvarado, into the management of the station. Johnson will be the General Manager; Oates will be the Station Manager; and Alvarado will be the Sales Manager. However, J&M would only credit the integration proposal of Oates. Highlands, on the other hand, would only credit the integration proposal of Johnson. Neither would credit the proposal of Alvarado.

85. The integration proposal of Lone Cypress is challenged because it is argued that the principals seeking integration credit will not be involved in management activities. Specifically, it is argued that Johnson will perform employee-type functions such as on-air broadcasting and sales; Oates will devote too much of her time to sales and doing commercials; Alvarado will devote a majority of her time to selling and was inconsistent in her testimony regarding the functions she will perform.

86. Johnson will be the General Manager of the proposed station and will perform the duties associated with such a position. The claim that he will perform employee-type functions and not managerial duties is rejected. Johnson is entitled to 100 percent integration credit on the basis of his proposal to devote full-time, 40 hours per week, to his duties as general manager of the station.[17]

87. While Oates will devote time to selling and doing commercials, this does not mean that she will not perform managerial functions at the station. She will be the full-time Station Manager, a managerial position, and as such will participate in the decision-making process at the station. In a small FM station, such as is proposed, it is not uncommon or unusual for the participating owners to devote time to selling. Indeed, it would seem the success of any start-up station depends on the ability to generate sales and attract an audience. Thus, participating owners who say they will devote time to selling are being realistic. That Oates will sell time for the station does not detract from her integration credit. *Victorson Group, Inc.*, 6 FCC Rcd 1697 (1991); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (1987), *rev. denied*, 3 FCC Rcd 4541 (1988); *Debra D. Carrigan*, 100 FCC 2d 721, 738 (1985).

88. The same can be said regarding Alvarado. Although she may spend 60 percent of her time as sales manager selling time herself, that does not mean she will not have managerial functions. As a one-third owner of Lone Cypress, Alvarado will manage the sales efforts of the station and, as such, is entitled to integration credit as the proposed Sales Manager. And, simply because she will not actually serve as the Program Director, as claimed in the integration statement (beyond the initial period of station operations), does not detract from her integration credit as sales manager. Finally, it is argued that Alvarado will not terminate her present broadcast employment and, therefore, she would be working 80 hours a week, a proposal not deserving of integration credit. However, Alvarado has pledged to terminate her position with a broadcast station and, thus, she will have no conflicting commitment to impair her ability to integrate full-time as sales manager.

89. Johnson's integration is enhanced by his local residence, limited civic involvement, and past broadcast experience. Although Oates has always resided in Monterey County, there is no showing that her residences were within the one mV/m contour of the station. Thus, while

Oates receives credit for female ownership, management participation, and past broadcast experience, the findings do not support credit for local residence.

90. Alvarado receives female and minority credit as a Hispanic. She also has past broadcast experience. But, as in the case of Oates, the Findings do not establish local residence, only past residence within Monterey County. Whether those residences were within the proposed service area is not apparent.

91. Thus, to summarize, Lone Cypress receives 100 percent integration credit with enhancement credit as follows: one-third local residence; two-thirds female credit; one-third minority credit; and 100 percent past broadcast experience. Lone Cypress also receives credit for proposing auxiliary power.

92. Highlands seeks 100 percent integration credit for its proposal to integrate Wisdom, Highlands' sole owner, full-time, into the management of the station as general manager. However, it is argued that Highlands is not entitled to 100 percent integration credit for the proposed full-time work commitment of Gilbert Wisdom because of the connection between Highlands and Alan P. Schultz (Schultz). In this connection, Schultz loaned Highlands $1,500 in February 1988 that the Promissory Note evidencing that obligation gave Schultz the right to convert the loan into 50 percent of Highlands' equity in the form of 1,500 shares of non-voting stock. Highlands repaid the $1,500 loan (with interest) to Schultz in June 1990, and Schultz' conversion option was thereby terminated.

93. Citing *Payne Communications, Inc.*, 1 FCC Rcd 1052 (1986), it is argued that because Schultz' option was in existence as of the "B" cut-off date, his option must be deemed, as a matter of law, to have in fact been exercised (even though in fact it was never exercised). It is further argued, citing *Coast TV*, 5 FCC Rcd 2751 (1990), that even though Schultz' option was to acquire non-voting Highlands stock, his involvement in Highlands and its application has been such that he must be considered as an "active" principal in Highlands for purposes of integration analysis.[18]

94. The arguments seeking to impose an attributable interest in Highlands to Schultz lack merit, and they are rejected. Clearly, *Payne*, *supra*, is not applicable because the option Schultz held was for a non-voting stock interest in Highlands. Moreover, in *Coast TV*, *supra* (page 2752), the Commission held that "where a 'passive' owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor," the owner will be considered "active" and his/her ownership interest will be considered for purposes of integration analysis.

95. Schultz' involvement in the FM application process preceded the filing of Highlands' application. His only involvement after the filing of the Highlands application was that of a lender.[19] Such involvement as a lender did not make Schultz an active investor sufficient to attribute his option to acquire a 50 percent non-voting stock interest into an active interest for comparative integration analysis. *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities*, 58 RR 2d 604, 620 (1985). Thus, Highlands is entitled to 100 percent integration credit.

96. Wisdom's integration proposal is enhanced by his residence within the service area since 1986, including residence within the city of license from January 1986 to January 1987. He will move within the city limits of Carmel if the Highlands application is granted. Wisdom receives some credit for civic participation, although such participation has not been particularly extensive. Wisdom also receives credit for past broadcast experience and his proposal for auxiliary power.

97. Wisdom also seeks minority credit for being a Hispanic and an American Indian. However, these claims were challenged by other applicants, and Wisdom has not substantiated his claim for such credit. The factors relied upon by Wisdom are set forth in the Findings, paragraphs 24-25. These factors appear similar to the ones rejected in *Jarad Broadcasting Co., Inc.*, 61 RR 2d 389, 399 (1986). Specifically, an "American Indian" entitled to minority credit is " a person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition." Wisdom has not substantiated his claim for minority credit with any form of documentation such as a birth certificate, tribal records, certification by a government agency, or other written evidence of genealogy. Wisdom's claim for minority enhancement credit is not self-evident. He has not established his entitlement to minority enhancement credit. Thus, no such credit will be awarded. Accordingly, Highlands receives 100 percent integration credit enhanced by short-term local residence (five years), some civic participation, past broadcast experience, and auxiliary power.

98. J&M seeks 100 percent integration credit for its proposal to integrate its two general partners, Johnston and McCullough, into full-time management positions at the station. However, arguments are made that J&M is not entitled to any integration credit because it did not have a written document evidencing its general partnership until May 1990, which was six weeks after integration statements were filed; that the written document is at odds with the integration plan; that the one-page general partnership agreement is inadequate; that because J&M will form a corporation to operate the station, its partnership application cannot be granted; that because McCullough's husband has been involved in making decisions and financing, the integration credit for McCullough should be diminished.

99. The absence of a written partnership agreement prior to the "B" cut-off date does not mandate denial of integration credit when uncontroverted sworn and written testimony establishes the existence of the partnership. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991). Nor does a different result obtain simply because the written general partnership agreement between Johnston and McCullough was executed after integration statements were filed. Both Johnston and McCullough agreed at the inception of their pursuit of the FM station that they would be a general partnership, with each partner holding a 50 percent interest. This structure has not changed, and the applicant has conducted itself as a general partnership throughout this proceeding. There is no reasonable basis for denying integration credit merely because the general partnership agreement was signed after the "B" cut-off date.

100. While Lone Cypress argues that the J&M written partnership agreement is inadequate, there is no meritorious reason advanced why the agreement is inadequate.

The agreement was prepared to memorialize the handshake arrangement that governed the general partnership from its inception.

101. It is further argued that because Johnston and McCullough intend to operate the station as a corporation (with each owning 50 percent of the stock), its partnership application is not entitled to integration credit. This argument has no merit. It was previously considered by the Presiding Judge in ruling on a petition to enlarge issues. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-3248, released October 22, 1990.) Significantly, the management functions and responsibilities to be performed by Johnston and McCullough upon which their claim for integration credit is based will be the same under the corporate form as under the general partnership form. Under these circumstances, the mere change in structure has no impact on the integration credit to which J&M is entitled.

102. Finally, it is argued that McCullough's integration credit should be diminished because her husband has been involved in the application. First, there is no evidence that McCullough's husband has participated in any meaningful way in preparing, prosecuting, or financing the application. Aside from demonstrating the usual interest one spouse would customarily show in the business interests of the other, there is no record evidence of involvement on the part of Mr. McCullough which would warrant diminishing the integration credit of McCullough. Thus, unlike *Richard P. Bott, II*, 4 FCC Rcd 4924 (1989), Mr. McCullough has not acted in a manner which would infer that he is a principal.[20] This project is being solely pursued by Ms. McCullough, not jointly with her husband, and there is no reasonable basis for diminishing her integration credit. *Colonial Communications, Inc.*, 5 FCC Rcd 1967 (1990). Thus, J&M will receive 100 percent integration credit.

103. The 100 percent integration credit of J&M is enhanced by the long time local residence of both Johnston and McCullough. Johnston has been a resident of Carmel and the service area for 26 years; McCullough has resided within the service area for 30 years. Also, both McCullough and Johnston have been significantly involved for a long time in civic activities, and McCullough also receives enhancement credit for being a female and a minority. Finally, J&M receives past broadcast experience for Johnston and for its auxiliary power proposal.

104. To summarize, Highlands, Lone Cypress, and J&M have received 100 percent integration credit. Of the three, the qualitative factors enhancing the integration credit of J&M are greater than the factors favoring the other two applicants. The long time local residence and active long time civic involvement of both Johnston and McCullough is superior to the other applicants. Moreover, 50 percent of the integration credit of J&M receives female and minority enhancement. Lone Cypress has 66 percent female ownership and 33 percent minority ownership, quite similar to J&M's enhancement credit for these factors.[21] But, Lone Cypress does not have the extent of local residence and significant civic involvement that enhances the J&M application.[22] Also of significance, Lone Cypress has a slight diversification demerit resulting from Johnson's ownership interest in another FM station. Highlands, whose integration is enhanced by short term local residence and limited civic participation is behind J&M on qualitative factors.[23] Based on consideration of the enhancement factors, J&M is preferred over both Highlands and Lone Cypress under the comparative issue, and a grant of its application will best serve the public interest. Paso Hondo, with no integration credit, is not a serious contender. It is out of the running.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (File No. BPH-880211MM) for a construction permit for a new FM station on Channel 238A in Carmel, California, IS GRANTED,[24] subject to the following condition:

> Upon receipt or notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

IT IS FURTHER ORDERED that the applications of Lone Cypress Radio Associates, Inc. (File No. BPH-880210ML), Highlands Broadcasting Co., Inc. (File No. BPH-880211MK), and Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (File No. BPH-880211ML) ARE DENIED.[25]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] The application of George S. Flinn, Jr., was dismissed by *Order* of the Presiding Judge, FCC 90M-720, released April 5, 1990; the application of California Kool Broadcasters Limited Partnership was dismissed by *Order* of the Presiding Judge, FCC 90M-721, released April 5, 1990; and the application of Carmel Broadcasting Limited Partnership was dismissed on the record at a hearing on March 4, 1991. This dismissal was confirmed by *Memorandum Opinion and Order* of the Presiding Judge, FCC 91M-871, released March 8, 1991. Cal Tower Broadcast Group requested that its application be dismissed in a filing dated October 22, 1991. By *Order* of the Presiding Judge, released December 3, 1991 (FCC 91M-3372), the application of Cal Tower Broadcast Group was dismissed, with prejudice.

[2] Also, the following issues were specified against Carmel Broadcasting Limited Partnership (CBLP) by *Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-3695, released November 23, 1990:

> To determine whether Frederik R. L. Osborne, President and majority stockholder of Auburn Cablevision, Inc., the purported "limited partner" in CBLP, has abused the Commission's processes in other comparative hearing

proceedings (*e.g.*, Irondequoit, New York - MM Docket No. 80-517 and Fresno, California, MM Docket No. 88-21) and/or in this proceeding; and

To determine, in light of the evidence adduced pursuant to the foregoing issue, whether CBLP is qualified to become a Commission licensee.

As noted earlier, CBLP defaulted in the prosecution of its application under these issues, and its application was dismissed.

[3] At her deposition, Alvarado stated that she could spend "a good 95 and a half percent" of her time selling, but more realistically estimated the time as "60 to 70 percent." (Tr. 470.)

[4] Hawaii state law requires that limited partnerships have individuals named as general partners, which accounts for Johnson's two separate interests, one in the corporate general partner and one as a named individual general partner. (Tr. 404.)

[5] Wisdom has not been an officer, director, or member of any committee in the Chamber of Commerce or the Ad Club.

[6] Wisdom's current 20,000 shares plus Schultz' current 4,000 shares, plus Schultz' additional 16,000 shares equals 40,000 shares. This would give Schultz 50 percent ownership of WBCI (*i.e.*, 20,000/40,000 = 50 percent), and Schultz' additional 16,000 shares would represent 40 percent of the total 40,000 shares of outstanding WBCI stock.

[7] The engineering consultant that Schultz contacted was Dave Williams. Schultz did not know Williams prior to the time WBCI purchased KRML-AM. (Tr. 1594.)

[8] Wisdom had discussions with Frank Jazzo regarding whether WBCI would qualify for the Daytimer's Preference if it were an applicant for the new Carmel FM facility. (Tr. 1428.) Jazzo also discussed this matter with Schultz and subsequently wrote Schultz a letter on the topic. (Tr. 1685; Lone Cypress Ex. R-2.)

[9] Jazzo confirmed this when he testified that Schultz did not react with much concern over WCBI's ineligibility for the Daytimer's Preference. (Tr. 1691.)

[10] Since February 1989, through his employment at Douglas Broadcasting, Schultz has been active in the management duties of radio Stations KEST-FM (San Francisco, California) and KWWN-FM (Placerville, California), working a total of about 60-70 hours each week. In addition to KEST and KWWN, Schultz recently assumed management duties at radio Station KOBO-AM (Yuba City, California). (Highlands Ex. R-2, p. 2.)

[11] The last loan Schultz made to Highlands was on May 10, 1990. (Lone Cypress Ex. R-3.) At that same time, another benefactor stepped in to finance Highlands. Ms. Judith Garber, identified as Wisdom's friend at the time of depositions and now his wife, started "funding" Highlands on May 1, 1990. She made nine "loans" to Highlands between May 1, 1990, and October 30, 1990. (Tr. 1445; Lone Cypress Ex. R-4.)

[12] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom.*; *Guinan* v. *Federal Communications Commission*, 297 F. 2d 782 (1961).

[13] Schultz testified at his deposition that he, at no time, thought he would be part of the entity that would apply for the FM station. He explained that he thought the question asked related to Highlands and answered accordingly. Schultz had no intention of participating in the Highlands application for the FM station. (Tr. 1592-1593.)

[14] The record does not reflect who was responsible for suggesting a convertible Note to secure Schultz' loans to Highlands. It appears that Wisdom, Schultz, communications counsel, and local counsel all participated to some degree in the origination and preparation of the Note.

[15] Lone Cypress' reliance on the attendance of Schultz at a settlement meeting to show he was a real party-in-interest is unpersuasive. Schultz attended the meeting because one of the proposals for consideration was the disposition of WBCI's AM station as part of the settlement. Because Schultz had an ownership interest in the AM station, it was not unusual for Schultz to have attended the meeting.

[16] The applicants stipulated that there is no significant difference in the areas or populations to be served by their respective proposed stations, and no applicant is entitled to any comparative advantage in this proceeding for superior coverage *vis - a - vis* any other applicant. (*Joint Ex. 1* received by *Order* of the Presiding Judge, released September 4, 1990 (FCC 90M-2775).)

[17] Johnson has a restaurant which he owns, but he now devotes only 25-30 hours a weeks to this interest, employees to run the restaurant are in place, and, in any event, such interest will not interfere with his ability to fulfill his integration commitment.

[18] *See*, CBLP's proposed conclusions of law at paragraphs 88-89 and Lone Cypress' proposed conclusions at pargraph 75.

[19] Schultz also participated in a settlement meeting, but he did so as a stockholder of WBCI, not as an active participant in Highlands. Because one of the settlement scenerios to be discussed involved WBCI's AM station (KRML(AM)) of which Schultz was part owner, he was present at the meeting.

[20] Mr. McCullough is a stockbroker who has never been an owner, operator, or employee of a broadcast station. He will not be involved in the proposed station.

[21] Past broadcast experience is a factor of limited significance. Lone Cypress and Highlands have 100 percent past broadcast experience; J&M has 50 percent past broadcast experience.

[22] Even if Lone Cypress received 100 percent local residence credit, because the local residence credit of the J&M principals is of greater duration and includes significant and extensive involvement in civic organizations, the J&M application would still be favored on this score.

[23] Each of the applicants receiving 100 percent integration credit has proposed auxiliary power, and no preference on this score is warranted.

[24] In a "Submission for the Record" filed by J&M on March 5, 1991, it was reported that the FAA raised questions regarding the potential of substantial adverse effect upon air/aground communications equipment from the J&M proposal. No air hazard issue against J&M was specified in the *Hearing Designation Order*, and none has been requested. However, because of the potential for interference to communications, the grant to J&M will be made subject to the condition usually specified in these situations.

[25] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-91-134

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication Between the United States and the Union of the Soviet Socialist Republics and Certain Eastern European Countries via the Intersputnik Satellite System for the Provision of Private Line Services not Interconnected with the Public Switched Network

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 20, 1991; Released: January 14, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-91-134 IS GRANTED, and MCI Telecommunications Corporation (MCI) is authorized to establish channels of communication between existing and prospective satellite earth stations in the United States (U.S.) and the Intersputnik satellite system for the provision of private line service not interconnected with the public switched telephone network (PSTN) between the U.S., the Union of Soviet Socialist Republics (U.S.S.R.) and certain Eastern European countries not members of INTELSAT: Poland, Hungary, Albania, Czechoslovakia, Romania and Bulgaria.

2. IT IS FURTHER ORDERED that the initial total number of circuits authorized herein to provide the requested service is two E-1 (2.048 Megabit per second (Mbps)) circuits

3. IT IS FURTHER ORDERED that the continued effectiveness to use the Intersputnik satellite system is conditioned on the outcome of a review after six months by the State Department and the Commission as specified in paragraph 11 of the Commission's Order, DA 91-621 (*see* 6 FCC Rcd 2932 (1991)).

4. IT IS FURTHER ORDERED that the applicant shall submit monthly reports detailing the number and capacity of private line circuits in use over the Intersputnik system. The reports shall include MCI's number and capacity of private line circuits in use over each communication system for the countries served by the Intersputnik system. This report shall be filed no later than the 20th day of each month and shall include the required information for the previous month.[1]

5. IT IS FURTHER ORDERED that MCI is authorized to provide private line services authorized herein using existing earth stations in the U.S. authorized to communicate with the Intersputnik satellite system or future earth stations which may be so authorized. Should MCI wish to construct its own earth station facility to provide these services, an appropriate application under Title III of the Communications Act will be required.

6. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See IDB Communications Group, Inc. et al.*, 6 FCC Rcd 2932 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3616

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 31, 1991; Released: January 3, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3616 to modify Virtual Telecommunications Network Service (VTNS) Option 32. The modification changes the Minimum Annual Charge language to specify that the customer may increase the Minimum Annual Charge at any time during the Multiyear Service Period. *See* AT&T Transmittal No. 3616 Description and Justification (D&J) at 1.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject modified Option 32 on November 25, 1991. AT&T filed a reply on December 5, 1991.

3. MCI argues that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 32. MCI asserts that the Commission intended to "grandfather" only those options on file as of August 1. MCI Petition at 4. MCI contends that the proposed revisions substantially alter Option 32, which MCI asserts establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3-4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. *Id.* at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3616 must be summarily rejected because it would effectively result in a "new" option subject to the August 1 prohibition. *Id.* at 3-4.

4. AT&T replies that this filing makes only one minor change to Option 32, allowing customers to increase their Minimum Annual Charge "at any time" during the VTNS term, rather than only on "each 12-month anniversary of Substantially Complete Installation", as the tariff currently provides. AT&T Reply at 1. AT&T also asserts that Transmittal 3616 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T argues that MCI repeats the same arguments it has raised since the inception of Tariff 12, alleging that Option 32 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 2-3.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3616, the revisions, and the associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3616, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association — Transmittal No. 475

Revisions to Tariff F.C.C. No. 5

Universal Service Fund and Lifeline Assistance Rates

ORDER

Adopted: December 30, 1991; Released: December 31, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 15, 1991, the National Exchange Carrier Association, Inc. (NECA) filed the above transmittal to increase its Universal Service Fund (USF) rate from 31.85 cents to 38.23 cents per line and to increase its Lifeline Assistance (LA) rate from 5.34 cents to 7.89 cents per line. NECA collects these rates from the largest interexchange carriers (IXCs) on the basis of each IXC's total number of presubscribed lines. NECA then distributes these funds to promote affordable telephone service among high cost LECs and low income subscribers. Both rates are scheduled to become effective for the six-month period from January 1, 1992, through June 30, 1992. NECA's USF filing represents an increase of $60.5 million above the current six-month revenue requirement of $235.9 million. NECA's LA filing represents an increase of about $17.8 million above the current six-month requirement of $43.3 million.

2. MCI Telecommunications Corporation (MCI) filed a petition on December 2, 1991, to reject or alternatively, to suspend and investigate the above transmittal. American Telephone and Telegraph Company (AT&T) filed a petition on the same date to suspend and investigate the transmittal. NECA filed its reply to these petitions on December 12, 1991.[1]

3. MCI questions the validity of the underlying loop data used by NECA to calculate the average national loop cost and related USF rates. In particular, MCI claims that USF recipients have significantly higher levels of growth in "loop total costs" and "unit costs per loop" as compared with similar non-recipients. MCI Petition at 5-7 (claiming increased costs are driven by extraordinarily high investment and growth in expense categories). Also, in examining the cost data submitted to NECA by USF recipients, MCI finds "countless cases" of "outrageous increases" in expense categories. *Id.* at 8 (noting that NECA is not required to audit such data). MCI urges the Commission to review all data submitted by USF recipients to ensure cost increases are both reasonable and justifiable and to conduct a special study of USF recipients that are subject to price cap regulation. *Id.* at 7 (noting that the annual access tariff filings of price cap carriers are no longer subject to the same review as the filings of rate of return carriers). By reducing the expense growth of USF recipients to not more than 10 percentage points above their reported percent increase in loop growth, MCI contends that NECA should be subject to a disallowance of $150 million. *Id.* at 9-10 (contrasting its requested disallowance with NECA's reported $2.2 million correction of the data submitted by USF recipients).

4. Next, MCI claims that NECA incorrectly applies Commission Rules which allow NECA to "resize" its projected revenue requirement on the basis of certain modifications made in the prior year's revenue requirement. *Id.* at 10. In particular, MCI asserts NECA double-counted certain expense adjustments, improperly added the amount of a disputed IXC bill (approximately $530,000) to its USF revenue requirement,[2] and that NECA, for unexplained reasons, reduced its USF revenue requirement by $6.2 million. *Id.* at 10-12. In addition, MCI claims to have found discrepancies between the data provided by USF recipients to NECA and similar data filed by these LECs with the Rural Electrification Administration (REA). *Id.* at 12-14.

5. Finally, MCI challenges NECA's claim that its USF program has driven increases in telephone penetration rates in the United States. MCI says NECA fails to show these increases are greater in areas served by USF recipients than in other areas and that NECA does not make adjustments for increases in personal income which also contribute to increased penetration. In addition, MCI claims that NECA is unable to show that there is a direct connection between LECs receiving USF subsidies and LECs using those funds to reduce local residential service rates.[3]

6. AT&T, like MCI, objects to the anomalously high and unexplained growth in costs reported by NECA among the USF recipients. AT&T conducted a statistical analysis of the USF study areas and found 308 areas whose costs are more than one standard deviation above the costs predicted by AT&T's model. After reducing the reported cost in each of those areas to not more than one standard deviation above the costs predicted for that area, AT&T submits that NECA's USF expenses should be reduced by $15.9 million. AT&T Petition at 3-6.

7. AT&T also objects to the unusually high expenditures reported by certain USF recipients in their accounting category for circuit equipment (Category 4.13). AT&T contends that, while this category is only one component of a larger account for central office transmis-

---

[1] NECA filed an erratum to its reply on December 16, 1991.

[2] In its only apparent objection to NECA's increase in the LA rate, MCI makes a similar claim with regard to NECA's inclusion in its LA revenue requirement of a disputed LA bill to the same IXC in the amount of $147,334. MCI Petition at 11 n.23.

[3] MCI Petition at 3 (citing Section 36.601 of the Commission Rules, 47 C.F.R. § 36.601, which provides that qualified LECs shall add to the expenses they allocate to the interstate jurisdiction an amount known as the "Universal Service Factor" which amount shall also be deducted from the expenses allocated to the intrastate jurisdiction). MCI notes that USF recipients are not required to demonstrate that such expense reductions in the intrastate jurisdiction are actually used to reduce residential local service rates in the intrastate jurisdiction. *Id.* at 3-4.

sion equipment (Account 2230), in 63 study areas the amount reported in Category 4.13 exceeds -- sometimes by a factor of 6 -- the amount reported in Account 2230. AT&T asserts that correction of this inconsistency in these study areas would result in a reduction of NECA reported expenses by $7.7 million. *Id.* at 6-8.

8. NECA claims that its has provided proper and adequate support for the underlying costs of the local loops maintained by USF recipients. NECA explains the various checks that it makes to determine: (1) if the study area data fall within certain parameters; (2) if the data are accurate; and (3) if they conform with Commission Rules. NECA Reply at 8-10 (noting recent improvements in its process and arguing that its efforts amount to a "significant level of review" of the USF data).

9. NECA contends that petitioners' analyses of these loop costs are flawed in three ways. First, NECA claims that the petitioners do not use reliable methodologies and that MCI incorrectly calculates the comparative growth in costs for USF recipients and non-recipients. *Id.* at 10-12. *See also id.* at 25 (claiming that USF revenue requirements are consistent with cost growth data drawn from comparable groups of companies that do not qualify for USF assistance).

10. Second, NECA claims petitioners' statistical analyses improperly focus on individual accounts of USF recipients in isolation rather than in the context of several interrelated accounts, makes the erroneous assumption that reported growth rates in excess of certain arbitrarily selected boundaries are invalid, and assumes cost increases are suspect but does not question offsetting cost decreases. *Id.* at 12-14 (claiming that elimination of these biases in AT&T's model would reduce its purported disallowance amount by 66.4%).

11. Third, NECA objects to the efforts of AT&T and MCI to equate outlier data with artificially inflated data simply because the data appear to be in excess of limits arbitrarily set by petitioners. *Id.* at 14-15. *See also id.* at 25 (noting that USF data represents actual historical costs incurred by USF recipients and not forecasts or estimates of future costs). NECA concludes that petitioners' statistical analyses, at most, point to areas which should receive closer examination but do not form a legal basis for disallowance by the Bureau. *Id.* at 5-6, 24-25. NECA also claims that the MCI petition is subject to dismissal for failing to specify more clearly how the NECA transmittal is defective and also for not stating a cause of action cognizable by the Commission. *Id.* at 6-7.

12. In response to AT&T's claims that USF recipients allocated more to the circuit equipment category (Category 4.13) than to the central office transmission equipment account (Account 2230), NECA explains that, for several reasons, the amount in Category 4.13 can be greater than Account 2230. At the outset, NECA notes that Account 2230 cost data are not directly incorporated into the USF algorithm but are more indirectly used in conjunction with data from other accounts to develop the figure used for Category 4.13 investment. *Id.* at 16. Next, NECA says that it is inappropriate to compare amounts in Category 4.13 with amounts in Account 2230 because amounts in Category 4.13 are subject to later adjustment. Finally, NECA adds that Category 4.13 investment includes certain amounts not booked to Account 2230. *Id.* at 15-17 (concluding that since these occurrences have no effect on *total* central office equipment amounts there is no USF impact).

13. On the resizing issue, NECA disputes MCI's claim that NECA double-counted certain quarterly adjustments by including those amounts in the resizing amount. NECA explains that while quarterly updates are provided by USF recipients on a "going forward" basis, the data are kept separate from the resizing process and are reported on a separate line in NECA's filing. *Id.* at 19. Regarding the disputed interexchange bills included in NECA's USF and LA revenue requirements, NECA says that the inclusion of these amounts is consistent with the rules governing the resizing of these two funds. *Id.* at 19-20 (claiming that USF recipients "rightly due" these monies under Part 36 of the Commission's Rules have been deprived of them). Regarding the alleged disappearance of $6.2 million from NECA's USF revenue requirement, NECA says MCI's calculation improperly incorporates third quarter 1991 actuals rather than the projected second quarter 1991 amount. *Id.* at 20-21.

14. NECA rejects MCI's comparison of data submitted to NECA by USF recipients and similar data filed with the REA. NECA says that MCI improperly compares 1989 REA data with the 1990 USF data. *Id.* at 21-22 (noting also that REA data is unaudited). NECA also claims that a comparison of REA data with USF data is not appropriate because of certain difference between the USF data and the REA data. *Id.* at 23. Finally, NECA asserts that MCI's NECA/REA comparisons are erroneous because MCI fails to properly aggregate study areas to the operating company level. *Id.* at 23-24.

15. The Common Carrier Bureau has reviewed NECA Transmittal No. 475 and all related submissions. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

16. Accordingly, IT IS ORDERED that the petitions against National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 475, filed by MCI Telecommunications Corporation and American Telephone and Telegraph Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T	Transmittal Nos. 3380,
COMMUNICATIONS	3537, 3542, and 3543

Revisions to Tariff F.C.C. No. 1

ERRATUM

Released: December 20, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 19, 1991, the Common Carrier Bureau released on Order, DA 91-1583, in the above captioned proceeding. This erratum corrects sentence one of paragraph nine of that Order to read as follows:

> We have also concluded that the issues raised by these four transmittals are complex and warrant exercise of our discretion to suspend them for five months pending investigation, until May 20, 1992.

2. In addition, this erratum corrects sentence one of paragraph nineteen of that Order to read as follows:

> IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE a supplement reflecting these suspensions no later than December 26, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-94

In Re Applications of

BIBLE BROADCASTING NETWORK, INC. File No. BPED-880301ML

WEISS BROADCASTING OF NOBLESVILLE, INC. File No. BPH-880301MQ

BROADCAST COMMUNICATIONS, INC. File No. BPH-880301MZ

BEN L. UMBERGER File No. BPH-880301PD

For Construction Permit for
New FM Station on Channel 230A,
Noblesville, Indiana

Appearances

Gary S. Smithwick and *Lisa Thornton* on behalf of Bible Broadcasting Network, Inc.; *Donald J. Evans* and *Andrew D. Fisher* on behalf of Weiss Broadcasting of Noblesville, Inc.; *Nathaniel F. Emmons* on behalf of Broadcast Communications, Inc.; and *Stephen C. Simpson* on behalf of Ben L. Umberger.

DECISION

Adopted: December 20, 1991; Released: January 15, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann, 6 FCC Rcd 3576 (1991), which granted the construction permit application of Weiss Broadcasting of Noblesville, Inc. (Weiss) and denied the applications of Bible Broadcasting Network, Inc. (Bible), Broadcast Communications, Inc. (BCI), and Ben L. Umberger (Umberger). The losing applicants have excepted to the *Initial Decision*, and Weiss has filed contingent exceptions. The Board held an oral argument on October 18, 1991, in which Weiss and BCI participated.[1] For the reasons set forth below, we are affirming the grant to Weiss.

2. The *Hearing Designation Order* in this proceeding, *R&B Ltd.*, 5 FCC Rcd 1901 (1990), originally designated these four applicants and four additional applicants for hearing on the "standard comparative" issue, which is governed primarily by the guidelines set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). In addition, the ALJ designated the following issues against BCI:

> 1. To determine whether BCI misrepresented or lacked candor by representing that Julio Fernandez has no other attributable media interests.
>
> 2. To determine whether BCI transferred control of station WYIC in 1985 without prior Commission approval.
>
> 3. To determine whether, in light of the foregoing, BCI has the requisite qualifications to be a Commission licensee.

R&B Ltd., FCC 90M-1594 (Admin. Law Judge, released June 27, 1990).

3. After hearing evidence on these issues, the ALJ concluded that BCI is not qualified. He found that BCI deliberately withheld information about the corporate officer position held by Fernandez, a BCI shareholder and officer, with Wabash Valley Broadcasting Corporation, which holds broadcast licenses in Florida and Indiana and owns two radio networks serving radio stations in Indiana as well as the program production and syndication division headed by Fernandez. *Initial Decision* at 3576-77 para. 4, 3582 para. 54. The ALJ also found that BCI willingly turned over control of daytime-only AM station WYIC, Noblesville, to a prospective purchaser without prior Commission approval. *Initial Decision* at 3583-84 para. 63. The ALJ would not have disqualified BCI for the Wabash Valley incident, but when he weighed that with the transfer of control incident, he concluded that BCI has not demonstrated its basic qualifications. *Initial Decision* at 3582 para. 54, 3583-84 para. 63, 3585 para. 73.

4. Of the remaining three applicants, the ALJ found that only Weiss and Umberger are entitled to full quantitative integration and that Weiss is preferred qualitatively under the integration factor. She has lived in the service area for many years and been active in civic affairs, has past broadcast experience, and is a female. Umberger, on the other hand, has more broadcast experience but will not move to Noblesville unless he wins the authorization. *Initial Decision* at 3585 para. 71. The ALJ also found that Weiss is superior under the diversification factor because she has no other broadcast interests, whereas Bible is the licensee of several stations, and Umberger did not show he does not have other interests. *Id.* at para. 72. Weiss is the only one of the three who proposed auxiliary power.

5. *Weiss.* Two of the applicants challenge the integration credit given Mary B. Weiss for her promise to work at the station full time as its general manager. Weiss is an Indiana corporation with both common voting stock and preferred non-voting stock. *Initial Decision* at 3579 para. 25. Ms. Weiss is president, secretary, and treasurer of the corporation and holds all of the authorized voting shares. Her son holds preferred Class B shares, and four others hold preferred Class A shares. Ms. Weiss and her son

[1] Bible and Umberger notified the Board that they did not plan to attend the argument and would rest on their exceptions.

contributed one-seventh of the funds but hold 76.1 percent of the equity. Referring only to this disparity and the fact that two of the preferred shareholders are successful businessmen who once had media interests,[2] Umberger asserts that Weiss' investors must be in control and, therefore, the application must be a sham.

6. To obtain comparative credit, an applicant must establish the overall reliability of its integration proposal. *See Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). If it does not do so, the Commission will not take the applicant's claim to integration credit at face value. *See generally Coast TV*, 5 FCC Rcd 2751, 2752-53 para. 15 (1990). Here, Ms. Weiss has made the required showing. She has committed to terminating her current employment and has no other business obligations that could conflict with her integration pledge. Weiss Ex. 2. She formed the corporation in February 1988 with one class of stock and in June 1988 amended the articles of incorporation to authorize issuance of non-voting preferred stock. The current preferred shareholders entered the company in 1990 at her invitation. *Id.*; *Initial Decision* at 3579 para. 25. Neither Umberger nor Bible point to anything in the record that suggests that the passive investors have been anything other than passive in their investments in Weiss or that otherwise contradicts Ms. Weiss' pledge. The passive investors here are inconsequential for integration purposes, and Weiss is entitled to full integration credit based on Ms. Weiss' proposal to integrate her voting ownership full time into management. *See generally Swan Broadcasting Limited*, 6 FCC Rcd 17, 19 para. 12 (Rev. Bd. 1991).[3]

7. *BCI.* BCI excepts to the ALJ's conclusion that it is not qualified to become a licensee of the Noblesville facility and argues that it is the comparatively superior applicant because of its claimed eligibility for the daytimer preference provided in *Availability of FM Broadcast Assignments*, 101 FCC 2d 638, 644-47 (1985), *clarified*, 59 RR 2d 1221 (1986). Weiss agrees with the ALJ and argues further that BCI's current ownership structure is a sham created on the eve of the cut-off for BCI's comparative advantage. In our analysis, we have assumed that BCI is fully qualified to hold a license and that BCI is entitled to the 90.95 percent integration credit it claims for the

---

[2] Thomas Binford, a banker, once held broadcast and cable television interests. Fred Tucker, a realtor, once had an interest in a cable television franchise.

[3] Umberger argues that the ALJ erred in refusing to add issues requested by R & B, Ltd., an applicant who dismissed its application before the ALJ had acted on all of its three petitions to enlarge the issues against Weiss. The ALJ denied R&B's petitions in *Memorandum Opinion and Order*, FCC 90M-1594 (released June 27, 1990), and *Memorandum Opinion and Order*, FCC 90M-2822 (released Sept. 10, 1990). Umberger complains of these rulings because "the parties were foreclosed from cross-examination at the hearing regarding same." Umberger Exceptions to Initial Decision, page 9, an argument that does not meet the showing of "points of fact and law relied on" that is required by 47 C.F.R. sec. 1.276 (a)(2)(v). The Board has no obligation to fashion arguments for parties and for this reason alone could dismiss Umberger's exception as unsupported. Although the Commission is expected to look beyond procedure when it is shown "a good deal of smoke," *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985), that is not the case here. We have reviewed the R & B petitions that Umberger has asked us to officially notice and find more speculation than fact. We conclude from them and the responsive pleadings filed by Weiss that there is no substantial and material question of fact concerning Weiss' qualifications. *See generally Citizens for Jazz on WRVR.* As the court stated clearly in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988)," mere conclusory allegations are not sufficient" to trigger a factual dispute.

R & B filed a Petition to Enlarge on April 10, 1990, after spotting inconsistencies in the numbers of shares of stock reported in Weiss' March 1989 annual report filed with the Indiana Secretary of State and its application in this proceeding. R & B sought a misrepresentation issue and further speculated that there must be a problem with Weiss' financial qualifications. Weiss responded that the annual report had errors because of Ms. Weiss' inexperience with such reports, and that these errors had been corrected in her 1990 report filed with the Secretary of State before R & B filed its petition with the ALJ. Weiss Opposition to Motion to Enlarge, April 25, 1990. In addition, although R & B's allegations about Weiss' financial qualifications were purely speculative, Weiss showed that its certification of its financial qualifications was based on a bank lending commitment issued after the bank had reviewed Ms. Weiss' personal finances. In FCC 90M-1594 the ALJ held, "It appears that Weiss made a few errors in reporting but those errors did not change the form or substance of Weiss' ownership." Para. 4.

R & B filed its Second Petition to Enlarge on August 1, 1990, alleging that Ms. Weiss had offered her potential license as collateral for a new bank loan and Weiss was not as forthcoming as R & B had wished in document production. R & B inferred that Weiss was no longer financially qualified because the bank had denied the new loan and Weiss was obligated to pay dividends to the new preferred shareholders during the pendency of the proceeding. In its August 13 opposition, Weiss demonstrated that its underlying financial qualifications had not lapsed. Ms. Weiss had merely pursued a firm financial commitment from an alternate bank in Noblesville but was premature in doing so. Weiss also showed that both Ms. Weiss and the bank understood that she intended using Weiss stock as collateral, not an FCC license. The ALJ correctly concluded in FCC 90M-2822 at para. 7 that "Weiss has demonstrated that R & B's contentions are without foundation."

R & B filed its Third Petition to Enlarge on August 10, 1990, asking the ALJ to add an abuse of process issue against Weiss. Counsel for Weiss had written to counsel for R & B questioning whether R & B's general partner had an ethical problem under ethics rules for the United States House of Representatives because, as a Congressman's principal staff assistant, she accepted an equity interest in the applicant disproportionately greater than her expected investment in the applicant. In its August 23, 1990, opposition, Weiss explained that R & B's general partner had received a 25 percent partnership interest but was obligated to provide only one percent of the equity, that the general partner had no previous broadcast experience, and that R & B repeatedly emphasized the general partner's connection to the Congressman for whom she worked as her most important asset. Weiss had suggested that Weiss and the general partner seek a private ruling on the question from the House Ethics Committee. The ALJ correctly held that "Weiss' explanation of its actions demonstrates that it did not use the Commission's processes improperly." FCC 90M-2822 at para. 8.

full-time employment of its president at the station, BCI Ex. 1, pp. 4-5. On the basis of our comparative evaluation of BCI and Weiss, we conclude that Weiss is preferred to BCI.

8. *Diversification.* BCI is an Indiana corporation, which was incorporated in 1978 with one class of common stock and restructured a few days before the application was filed by adding Class A and Class B common stock. As a result of this restructuring, BCI has issued and outstanding 505 shares of common stock with one vote each, one share of Class A stock with 8,540 votes, and one share of Class B stock with 415 votes. Each share of stock is equal in value to every other share, regardless of voting rights. BCI Ex. 1, p. 1. Emmett E. DePoy, BCI's President, Assistant Secretary and Treasurer, holds 100 shares of common stock and the sole share of Class A stock. With this, he has 91.33 percent of the voting rights (90.95 percent at the cut-off date) and 19.22 percent of the equity. *Id.* at page 2. He is the only BCI owner who proposes to be fully integrated in the applicant's day-to-day operations. Julio Fernandez, BCI's Vice President and Secretary, holds 65 shares of common stock and the sole share of Class B stock. He has 5.07 percent of the voting rights and 13.02 percent of the equity. *Id.* Fernandez also is Vice President and General Manager of TelX Entertainment, the video syndication and production division of Wabash Valley Broadcasting Co., and is a corporate vice president of Wabash. Wabash is the licensee of WTHI-AM-FM-TV, Terre Haute, Indiana, (about 80 miles from Noblesville, BCI Ex. 2, p. 4) and two television stations in Florida. It owns two radio networks: Network Indiana, which provides news programming to 46 radio stations in Indiana; and Agri-America, which provides programming to 65 radio stations, most of which are in Indiana. *Initial Decision* at 3576 para. 4. BCI has no other officers.

9. BCI's remaining shareholders have interests ranging from 0.42 percent to 1.06 percent of the voting rights (7.89 percent to 19.72 percent of the equity). BCI Ex. 1, p. 2. Of these, only Robert A. and Sandra S. Borns, who jointly own 40 shares of common stock (0.42 percent of the voting rights), have any other media interests. *Id.*, pp. 3-4. Robert Borns owns 5.7 percent of the voting stock and is a director of Heritage Partners Management, which is the general partner of University Broadcasting Co., the licensee of FM broadcast stations in Lafayette and Bloomington, Indiana. Heritage owns three percent of the equity in University and also owns 34.98 percent of University's limited partner. Sandra Borns owns 4.4 percent of the voting stock in Heritage. In addition, Ms. Borns and James Morris (1.06 percent of BCI's voting rights and 19.72 percent of its equity) have been members of the Board of Trustees of Butler University, licensee of educational station WAJC-FM, Indianapolis. *Initial Decision* at 3580 para. 39. These interests are *de minimis. See Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 647-48 para. 8 (Rev. Bd. 1983) (subsequent history omitted).

10. BCI has no directors. Under the Articles of Restatement of the Articles of Incorporation of Broadcast Communications, Inc., adopted a few days before BCI filed its application, BCI Ex. 1, Tab B, the duties normally performed by directors shall be performed by the shareholders, including service on any committees of shareholders. *Id.* at 6. Shareholders may meet periodically, *id.* at 8-9, although, Fernandez testified that he attended only one shareholders meeting since the Articles of Restatement were adopted, on May 11, 1988. BCI Ex. 2, p. 3. Special meetings can be held on demand of holders of twenty-five percent of the votes. Articles of Restatement, sec. 7.2, BCI Ex. 1, Tab B, pp. 8-9. Actions requiring shareholder or committee meetings can be taken without a meeting if written consents are signed by all shareholders or committee members entitled to vote at the meeting. *Id.*, sec. 7.3, p. 9.

11. In its *Policy Statement* at 394, the Commission clearly stated that diversification of the control of the media of mass communications is "a factor of primary significance" in its licensing decisions. The Commission was guided by the Supreme Court's statement in *Associated Press v. United States*, 326 U.S. 1, 20, that the first amendment to the Constitution " 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' " *Policy Statement* at 394 n. 4. The Commission also clearly stated that it will consider both common control and "less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest.... the less will be the significance of the factor." *Id.* at 394. Both direct and indirect media interests are relevant to the diversification analysis. *See CJL Broadcasting, Inc.*, 95 FCC 2d 544, 549 para. 11 (1983).

12. BCI argues that, in its case, diversification should have little significance because Fernandez' Wabash position does not involve broadcasting. We disagree for, as the record shows, Fernandez is not fully insulated from contact with the other parts of the company, and there is some overlapping of interests. Wabash is a single corporation with separate divisions (but not separate subsidiaries) for its broadcasting, network, and video production/syndication interests. Fernandez has "performed in an advisory capacity in one of [Ocala Station WOGX'] events" and has provided advice to "WFDX, the station in Fort Myers for the same purpose," i.e., coverage of a parade. Tr. 582. Typical of the advice would be an exchange between Fernandez and the station general manager regarding talent at the event. Tr. 583-84. Fernandez once attended the Indiana Broadcaster's Convention. Tr. 584. He and the other corporate vice presidents who head divisions usually attend Board meetings, which are held at a Wabash television station, to make presentations to the Board. Tr. 586. The presentations are attended by all the division heads and address philosophy, accomplishments, and future plans, Tr. 588-89, but division heads do not comment on the presentations of other divisions or discuss operations with each other.

13. In *Attribution of Ownership Interests*, 97 FCC 2d at 1008 para. 19,[4] 1009 para. 21, the Commission specifically found that officers and directors of licensee corporations are attributable whether or not they have any ownership interest in the corporation, because of the opportunity they have to influence multiple broadcast licensees.[5] The

[4] There the Commission noted that "those parties who wield particular influence are reasonably certain to appear as officers and directors and to have an interest attributed on that basis."

[5] Attributable interests for purposes of diversity analysis have

Commission did recognize that its premise might not be valid in all cases, so it provided a waiver mechanism for officials "whose duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest." *Id.* at 1025 para. 58; *see id.* n. 67. BCI would have the Review Board act as if there had been a waiver, *see* Tr. 793, 795, 800-801, but no formal waiver has been requested here, and no information has been provided about Wabash's views on Fernandez' current or future role with the company or on an attribution waiver for Fernandez. More important, as noted above and as found by the ALJ at *Initial Decision* at 3577 para. 4, Fernandez has had involvement with Wabash's stations.[b]

14. BCI also argues that Fernandez is inactive at BCI. *See* BCI Ex. 2, pp. 3-4. Nonetheless, Fernandez does have slightly more than five percent of the voting rights at BCI through his stock ownership, and he is the only corporate officer of BCI other than the president. Although BCI would have us treat his role as passive in fact, even if not passive by law, we are having difficulty reconciling his position as Vice President and Secretary with BCI's assertion of his non-involvement. We note further that BCI shareholders function in lieu of a board of directors. Although the shareholders have not met since the cut-off date, we cannot assume that they will never play a role. Indeed, BCI's Articles of Restatement at sec. 7.3 provide that corporate actions requiring shareholder approval cannot be taken outside shareholder meetings without the approval of all the shareholders, not just those controlling a majority of the votes.

15. *Integration.* In comparing BCI with Weiss, we have considered whether BCI's integration position is sufficient to overcome the negative effect of the attribution of Fernandez' media interest and conclude that it is not. Emmett DePoy, BCI's president who controls almost ninety-one percent of the voting rights, will be integrated full-time at the station. DePoy has lived in the service area almost all of his life and has intermittently been a member of local civic or business organizations. BCI Ex. 1, pp. 5, 9-10, although some of these memberships are remote in time. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109-10 para. 6 (Rev. Bd. 1984) (credit diminished by remoteness in time), *review denied*, 100 FCC 2d 941 (1985), *accord, Ronald Sorenson*, 6 FCC Rcd 1952, 1953 para. 10 (1991). DePoy was a member of the Carmel/Clay Kiwanis Club from 1973-76, a member of the Noblesville Elks Lodge from 1979-80 and from 1987 to the present (he served on the regional committee to promote a fund raising event in 1985), and a member of the Carmel and Noblesville Chambers of Commerce from 1987. He served on the Committee for the Noblesville on the River Festival from 1988-89. *See Oliver Kelley and Mary Ann Kelley*, FCC 91R-110, slip op. at 5 para. 20 (Rev. Bd. released Dec. 16, 1991) (postfiling civic involvements are accorded little weight). More than twenty years ago, he served on a Conference of Cities Committee that arranged accommodations and schedules for out-of-town visitors to Indianapolis, BCI Ex. 1, p. 9. *See Linda Crook*, 3 FCC Rcd 354 para. 5 (Rev. Bd. 1988) (an activity occurring more than 20 years ago is too remote to be meaningful).

16. In contrast, Weiss is entitled to 100 percent quantitative integration credit for Ms. Weiss' proposed full-time management role at the station. Ms. Weiss, like DePoy, receives credit for her long-term residence (since 1972), but she has had greater and continuous civic involvement in a wider range of activities since 1973, indicating a greater overall knowledge of and interest in the community than DePoy. *See Ronald Sorenson* at 1953 para. 11; *see also Policy Statement*, 1 FCC 2d at 396. Ms. Weiss' activities include: membership in the Indiana Chapter of American Women in Radio and Television which, among other service area activities, supports a community child care crisis center (she held leadership positions in 1981-82, 1982-83, 1984-85, was president from 1986-87, served on the charity fund raising committee from 1985-87 and chaired it in 1988 and 1989); active membership on the St. Margaret's Hospital Guild since 1985; current membership on the Board of Directors of Girls Clubs of Greater Indianapolis; and membership on the United Way of Greater Indianapolis' Fund Raising Team in 1988. She also chaired the Old Time Radio Fundraiser for St. Mary's Child Care Center in 1984 and served on the committee in 1983. She promoted the Broadripple Art Fair for the Indianapolis Art League in 1984 and, in 1988, worked with the Noblesville Chamber of Commerce for broadcast promotion of the Noblesville on the River event. Weiss Ex. 2, pp. 3-6. *See Initial Decision* at 3579 para. 27. *See also Oliver Kelley and Mary Ann Kelley, supra*, (post-filing civic activities are accorded little weight). Although DePoy has lived in the area longer than Ms. Weiss has, any advantage accruing to DePoy for length of residence is outweighed by Ms. Weiss' substantial advantage for civic activities. Thus, in the overall

---

not always been treated the same as attributable interests for multiple ownership purposes. Because of its concern that comparative selections of broadcast licensees favor those with no other media interests or fewer other interests than other applicants, the Commission has been more inclusive in what it considers relevant for diversification than it has for multiple ownership attribution. *See, e.g., Doylan Forney*, 5 FCC Rcd 5423, 5427 para. 30 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. Oct. 7, 1991); *Woods Communications Group*, 6 FCC Rcd 3529, 3533 n. 4 (Rev. Bd. 1991). *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934-35 (1986), was notable because it excluded from diversity analysis those passive interests that had been excluded from attribution for multiple ownership purposes. Until *Daytona*, even the media interests of passive owners had been weighed adversely in the comparative diversity analysis. The Commission has clearly stated the value of the diversification objective in comparative proceedings:

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

Policy Statement, 1 FCC Rcd at 394.

[b] A significant interest in a network also carries diversification ramifications. *See generally Policy Statement*, 1 FCC 2d at 394; *Ronald Sorenson*, 5 FCC Rcd 3144, 3149 n. 15 (Rev. Bd. 1990), *modified on other grounds*, 6 FCC Rcd 1952 (1991). During oral argument, counsel for BCI advised the Board that, "There is no evidence that [BCI's AM station] didn't [carry Wabash network programming]," although questions were asked on that point. Tr. 804. There also is no showing that BCI would not carry Wabash network programming on the FM station if awarded the license.

comparison, Weiss is entitled to a significant enhancement credit on the local residence factor. *See Ronald Sorenson, supra.*

17. BCI is entitled to enhancement credit for the past broadcast experience of DePoy, who has spent virtually his whole career in broadcasting in both management and non-management positions. Ordinarily, this enhancement would carry less weight than the strong credit given for the local residence enhancement, *see Policy Statement* at 396, *Swan Broadcasting Limited,* 6 FCC Rcd at 21 para. 17, or the lesser female gender preference to which Weiss is entitled. *See Swan.* However, BCI also claims credit for substantial participation in management at its daytime-only station WYIC in Noblesville. This would upgrade the value of its broadcast experience credit to that of local residence. *Availability of FM Broadcast Assignments,* 101 FCC 2d at 645 para. 20.[7]

18. To be eligible for this enhanced credit, BCI must, among other factors,

> demonstrate that members of the entity holding cognizable ownership interests spent more than 20 hours per week (either individually or in the aggregate) participating in the management of the daytime-only facility during the three-year period.

Availability of FM Broadcast Assignments, 59 RR 2d at 1229 para. 22. The three-year period is the three continuous years before filing the FM application. *Id.* at 1230 para. 23. BCI bases its claim to the preference on the successive participation of BCI President James Mathis from March 1, 1985 to May 20, 1986 (17.2 % voting stockholder until his death in 1986), BCI Vice President and then President Julio Fernandez from May 20, 1986 to January 1, 1987 (no stock interest during this time), and BCI President and then Vice President Emmett DePoy from January 1, 1987 to March 1, 1988 (15.5 % voting stockholder during that time). BCI Ex. 1, Tab. I. Weiss argues that BCI cannot receive credit for an owner who died during the three-year period or for an officer who worked at the station but did not have an ownership interest until later. We disagree. The preference is available to the AM licensee/FM applicant, *i.e.,* BCI. It runs with the applicant rather than the individuals who worked at the applicant's AM station, *see Availability of FM Broadcast Assignments* , 59 RR 2d at 1229 para. 21, and is awarded when members of BCI holding cognizable ownership interests under the Commission's attribution rules, including officers and directors, meet the required showing of participation at the AM station, either individually or in the aggregate, and the other criteria are met. *Id.* at para. 22. Thus, BCI can aggregate the participation of those whose interests are attributed to it over the three year period in making its showing of entitlement to the enhancement.

19. No one disputes that Fernandez and DePoy worked at the station at least 20 hours a week during the periods claimed for them. However, Weiss questions whether BCI has made an adequate showing with respect to the time Mathis spent at the AM broadcast station before he died. In his findings on the AM preference issue, the ALJ had referenced only the hearsay testimony of DePoy who did not personally observe Mathis' work at the station during the period relevant to the AM preference. However, the record includes Fernandez' testimony that he worked with Mathis during the relevant period and observed that Mathis spent about fifty hours each week working for BCI. "All told, he spent about half his overall time on WYIC and half on syndication matters." BCI Ex. 2, p. 2. This unrebutted testimony is sufficient to establish that Mathis' participation satisfied the minimum time requirement for the period during which BCI is relying on Mathis' work at the AM station.

20. BCI meets the other criteria for the daytimer preference and, thus, is entitled to the enhanced preference for past broadcast experience available to applicants who also operate a daytime AM station in the same community as the proposed FM station.[8] Ms. Weiss, who has past broadcast experience in sales and as an account executive since 1979, has no management experience and no claim to the enhanced AM daytimer preference. *See Initial Decision* at 3579 para. 28. Thus, her very minimal enhancement under the broadcast experience factor is substantially outweighed by BCI's credit.

21. *Conclusion.* In the final analysis, however, Weiss is a stronger applicant than BCI. It has no diversification demerit, and it is 100 percent integrated. BCI has a diversification demerit from Fernandez' positions at BCI and Wabash, and it is not quite ninety-one percent integrated.[9] Although BCI claims a dispositive integration enhancement from its daytimer AM preference, this is not sufficient to overcome Weiss' superior quantitative integration with its superior local residence and its gender enhancement and BCI's diversity demerit.[10]

22. Weiss also is comparatively superior to both Bible and Umberger. Bible has substantial broadcast interests for which it receives a diversification demerit, and it does not propose to be integrated. *See Initial Decision* at 3579 paras. 23-24, 3584-85 paras. 71-72. Umberger proposes to be fully integrated into the management of the station, *see id.* at 3581, paras. 45-47, but his promise to move to Noblesville if he wins is "accorded less weight" than Ms.

---

[7] BCI is entitled to the credit to the extent that it is integrated, *i.e.,* to the extent of DePoy's participation as an owner in the FM station's management. *Availability of FM Broadcast Assignments,* 101 FCC 2d at 646 n. 14.

[8] Applicants must also propose integration of ownership into the management of the FM station and must promise to divest the AM station within 3 years from the commencement date of program test authority. *Availability of FM Broadcast Assignments,* 101 FCC 2d at 646 paras. 21-22.

[9] The nine percent disparity between BCI and Weiss is relevant but, by itself, is not decisional. *Compare Continental Broadcasting Company,* 88 FCC 2d 830, 850 (Rev. Bd. 1981) (12.5 percent quantitative difference is significant enough to warrant a slight preference regardless of qualitative enhancements), *with Metro Broadcasting, Inc.,* 2 FCC Rcd 1474, 1475 para. 9 (1987) (a difference of about three percent is not significant) (subsequent history omitted).

[10] Weiss has questioned the bona fides of BCI's ownership structure as it applies to both BCI's quantitative integration claim and its claim to an AM daytimer preference. Weiss also has asked for air hazard and real-party-in-interest issues against BCI. Each of these points is mooted by the disposition here. With respect to the real-party-in-interest issue, we note the ALJ's finding that the issue would be necessary if BCI were a comparative contender in this case. *Initial Decision* at 3584 para. 70. Thus, if BCI could otherwise prevail, further hearing might be necessary. *Cf. Sunshine Broadcasting, Inc.,* 6 FCC Rcd 5981, 5984 para. 18 (Rev. Bd. 1991).

Weiss' enhancement for long-term local residence and civic activities. *Policy Statement*, 1 FCC 2d at 396. His past broadcast experience, although superior to Ms. Weiss', also does not carry the weight of her local residence enhancement. *See id.* (local residence has great significance but past broadcast experience has only "minor significance" in the comparative integration analysis).[11]

23. ACCORDINGLY, IT IS ORDERED That the Petitions for Leave to Amend filed by Bible Broadcasting Network, Inc., on July 22, August 26, October 7, November 7, and December 20, 1991, ARE GRANTED and the amendments ARE ACCEPTED.

24. IT IS FURTHER ORDERED That the Petitions for Leave to Amend filed by Broadcast Communications, Inc., on July 19 and August 1, 1991, ARE GRANTED and the amendments ARE ACCEPTED for informational purposes and that the Petition for Leave to Amend filed by Broadcast Communications, Inc., on October 11, 1991, IS GRANTED and the amendment IS ACCEPTED.[12]

25. IT IS FURTHER ORDERED That the application of Weiss Broadcasting of Noblesville, Inc. (File No. BPH-880301MQ) for a construction permit for a new FM station at Noblesville, Indiana, IS GRANTED; and that the applications of Bible Broadcasting Network, Inc. (File No. BPH-880301ML), Broadcast Communications, Inc. (File No. BPH-880301MZ), and Ben L. Umberger (File No. BPH-880301PD) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[11] Our decision here moots the issues raised regarding the diversification demerit that the ALJ gave Umberger for failing to provide evidence "about any media interests," *Initial Decision* at 3585 para. 72, and the full integration credit he gave Umberger who has a pending application for a new FM station in Chandler, Indiana. *Id.* at 3584-85 para. 71.

[12] BCI filed a petition to amend its application by substituting a new transmitter site after the tower on its previous site was sold and dismantled. The Mass Media Bureau filed comments stating that the amendment meets the appropriate technical standards. BCI has demonstrated good cause, and its amendment is accepted. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS, CORP.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA.	E-90-317
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES.	E-90-318
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND.	E-90-319
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA.	E-90-320
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA.	E-90-321
THE DIAMOND STATE TELEPHONE COMPANY.	E-90-322
NEW JERSEY BELL TELEPHONE COMPANY.	E-90-323
INDIANA BELL TELEPHONE COMPANY.	E-90-324
MICHIGAN BELL TELEPHONE COMPANY.	E-90-325
OHIO BELL TELEPHONE COMPANY.	E-90-326
WISCONSIN BELL, INC.,	E-90-327
NEW YORK TELEPHONE COMPANY.	E-90-328
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.	E-90-329
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.	E-90-330
NORTHWESTERN BELL TELEPHONE COMPANY.	E-90-331
PACIFIC NORTHWEST BELL TELEPHONE COMPANY.	E-90-332
PACIFIC BELL TELEPHONE COMPANY.	E-90-333
SOUTH CENTRAL BELL TELEPHONE COMPANY.	E-90-334
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.	E-90-335
SOUTHWESTERN BELL TELEPHONE COMPANY.	E-90-336
CINCINNATI BELL TELEPHONE COMPANY.	E-90-337
GTE NORTH, INC.,	E-90-340
UNITED TELEPHONE COMPANY OF THE CAROLINAS.	E-90-342
UNITED TELEPHONE COMPANY OF PENNSYLVANIA.	E-90-345

Defendants.

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 662 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY and	File No. E-90-42
WALNUT HILL TELEPHONE COMPANY,	File No. E-90-60
Defendants.	

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 651 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-214
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-215
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-216
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-217
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-218
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-219
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-220
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-221
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-222
OHIO BELL TELEPHONE COMPANY,	File No. E-90-223
NEW YORK TELEPHONE COMPANY,	File No. E-90-224
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-225
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-229
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-230
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-231
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-232
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-233
CONTEL OF ARKANSAS, INC.,	File No. E-90-236
CONTEL OF CALIFORNIA, INC.,	File No. E-90-237
CONTEL OF INDIANA, INC.,	File No. E-90-238
CONTEL OF IOWA, INC.,	File No. E-90-239
CONTEL OF KANSAS, INC.,	File No. E-90-240
CONTEL OF KENTUCKY, INC.,	File No. E-90-241
CONTEL OF MISSOURI, INC.,	File No. E-90-242
CONTEL OF NORTH CAROLINA, INC.,	File No. E-90-243
CONTEL OF SOUTH ALABAMA, INC.,	File No. E-90-244
CONTEL OF SOUTH GEORGIA, INC.,	File No. E-90-245
GTE NORTH, INC.,	File No. E-90-246
GTE SOUTHWEST, INC.,	File No. E-90-247
CAROLINA TELEPHONE AND TELEGRAPH COMPANY, INC.,	File No. E-90-248
UNITED TELEPHONE OF THE CAROLINAS, INC.,	File No. E-90-249
UNITED TELEPHONE OF INDIANA, INC.,	File No. E-90-250
UNITED TELEPHONE OF NEW JERSEY, INC.,	File No. E-90-251
UNITED TELEPHONE OF OHIO, INC. and	File No. E-90-252
UNITED TELEPHONE OF TENNESSEE, INC.,	File No. E-90-253

Defendants.

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 659 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINE OF SACRAMENTO, INC.,
Complainant,

v.

NEVADA BELL and PACIFIC BELL TELEPHONE COMPANY,
Defendants.

File No. E-90-255
File No. E-90-256

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 700 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIVERSIFIED OF
TENNESSEE, INC.,
Complainant,

v. File No. E-90-257

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 701 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH TEL, INC.,
Complainant,

v. File No. E-90-390

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 7, 1992; Released: January 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 657 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY CICI, INC. d/b/a/ IDB INTERNATIONAL GTE HAWAIIAN TELEPHONE COMPANY, INC. MCI INTERNATIONAL, INC. TRT/FTC COMMUNICATIONS, INC. US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, and WORLD COMMUNICATIONS, INC.

File No. I-T-C-91-135

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System between the United States and Germany and the Netherlands.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 19, 1991; Released: January 13, 1992

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application[1] filed on May 28, 1991 by American Telephone and Telegraph Company ("AT&T"), CICI, Inc. d/b/a IDB International ("IDB International"), GTE Hawaiian Telephone Company, Inc. ("HTC"), MCI International, Inc. ("MCII"), TRT/FTC Communications, Inc. ("TRT/FTC"), US Sprint Communications Company Limited Partnership ("US Sprint"), and World Communications, Inc. ("Worldcom") (hereinafter collectively called the Joint Applicants). The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital submarine cable system, known as the TAT-10 Cable System (TAT-10), extending between Rhode Island, U.S. on the west and Norden, Germany and Alkmaar, Netherlands on the east. TAT-10 will be jointly owned by the Joint Applicants and 28 foreign telecommunications administrations and carriers. The Joint Applicants propose that TAT-10 will be operational in August 1992.

2. The Joint Applicants also seek authority to: (a) acquire capacity in TAT-10; (b) acquire, by lease or on an Indefeasible Right of User (IRU) basis, such extension facilities as may be required to extend capacity in TAT-10; (c) convey to its correspondents, or to non-owners, half-interests in Minimum Investment Units (MIUs)[2] on an IRU basis; and (d) activate and operate capacity in TAT-10 and in the aforementioned facilities for the provision of their respectively authorized telecommunications services.

3. The Joint Application was placed on public notice on June 5, 1991. A petition to deny (Petition) the accompanying TAT-10 Cable Landing License application, File No. SCL-91-001, was filed by Submarine Lightwave Cable Company (SLC).[3] On July 22, 1991 the Joint Applicants[4] filed a Reply,[5] in response to which SLC filed a Reply and Clarification of its Petition.

I. THE APPLICATION

4. The Joint Applicants will use TAT-10 to supplement their existing facilities in providing the services which each is presently furnishing or which each may subsequently furnish.[6] TAT-10 capacity will be extended by suitable facilities to the borders of other TAT-10 participating countries or to the terminals of other international communications systems, including other cable terminals and satellite earth stations, resulting in services between the United States, Germany, and the Netherlands as well as to points beyond in both the east and the west.

5. The TAT-10 Construction and Maintenance Agreement (C&MA)[7], initialed on April 26, 1991, defines the proposed cable system in terms of segments for ownership purposes. TAT-10 will consist of six segments. Segments A, C, and F are, respectively, the cable stations at Green Hill, Rhode Island (U.S.), Norden, Germany, and Alkmaar, Netherlands. Segment E is the intermediate repeater cable station at the Island of Terschelling, Netherlands, located between Segments C and F. Segment B consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments A and C. Segment D consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments C and F. The System Interface is defined as the nominal 140 Megabits per second (Mbit/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

6. The transatlantic configuration of TAT-10 will be based upon a three fiber pair system,[8] with each fiber pair operating at a bit rate of 560 Mbit/s per fiber pair. The capacity on each of the fiber pairs is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 MIUs. The transatlantic capacity of TAT-10 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication systems can be deployed to derive approximately 150 virtual voice paths per MIU.

7. The estimated total cost of TAT-10 is $300 million. The Joint Applicants' share of costs is $104.04 million which will be allocated proportionally to each U.S. owner, by segment, based on their percentage ownership interests in Segments B and D contained in Schedule B of the C&MA. The estimated costs include neither the U.S. carriers' cost for interest during construction, currently projected at $10.4 million for the system, nor the cost of circuit multiplication equipment, which is not considered part of the cable system. Fixed costs (84.7%) include sub-system and cable activities, repeaters, acceptance tests and terminal equipment. Suppliers' cost-incurred items

(10.3%) include the costs associated with plowing, post-lay burial and pipeline crossings. Owners costs (5%) include the route survey, project administration and inspection. The estimated original capital cost per half MIU over the life of the cable without multiplexing is $269,717 from the United States to Germany and $291,968 from the United States to the Netherlands.

8. As indicated in Appendix 1 (Schedule B of the C&MA), the Joint Applicants' collective voting interest in TAT-10 is 34.6%. Appendixes 2A and 2B (Schedules C-1 and C-2 of the C&MA), respectively, show ownership interests and allocation of capital, operating and maintenance costs of Segments B and D, and allocation of capital, operating, and maintenance costs of Segment A, Subsegments C-1 and C-2, Segment E and Segment F of TAT-10. Appendix 3A, 3B and 3C (Schedules D-1, D-2 and D-3 of the C&MA) show the capacity in TAT-10 that is assigned to each of the owners, upon which the costs are based.[9] The capacity assignments contemplate each Joint Applicant's proposed utilization of circuit multiplication equipment. Both prior and subsequent to the System Ready for Customer Service (RFCS) date (August 15, 1992), carriers, including non-owners of TAT-10, may acquire TAT-10 capacity by IRU, lease or other mutually agreed upon arrangements.

9. The Joint Applicants state that the placing into service of the TAT-9 Cable System is expected to be followed by a rapid growth of demand for reliable, secure and economically priced telecommunications services based upon digital lightwave technology, which has resulted in the total forecasted utilization of the TAT-9 Cable System. In addition, they expect unprecedented demand for service to Northern Europe due to the recent political events in Eastern Europe and Germany. The Joint Applicants note that the reliability of telecommunications services and their usefulness to customers is in part a function of the availability of comparable facilities for diverse routing and service restoration. The Joint applicants also note that TAT-10 will provide increased capacity which will be available for contribution toward digital transatlantic cable restoration. In further support of their application, the Joint Applicants point out that the Commission, in the *TPC-4 Order* [10], indicated that competitive conditions, the elimination of circuit loading guidelines, and the implementation of price cap regulation of AT&T have made it appropriate to give U.S. international carriers wider latitude in determining what facilities to construct and when to place such facilities in service. According to the Joint Applicants, all of the above factors serve to guarantee that TAT-10 will be in the public interest.

II. DISCUSSION

10. The Joint Applicants seek authority to construct and operate the digital TAT-10 Cable System to begin service in late 1992 to meet their telecommunications capacity needs and those of their correspondents in the Atlantic Ocean Region (AOR) during the 1992-1995 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, and conclude that implementation of TAT-10 in 1992 will serve the public interest. Accordingly, we grant the Joint Application subject to certain conditions.[11]

A. The Need for the TAT-10 Cable System

11. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[12] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[13]

1. Demand and Capacity

12. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the operation of TAT-10 in 1992 to meet the telecommunications needs of the Joint Applicants and their correspondents in the AOR during the 1992-1995 time frame. The Commission has recognized that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness.

13. We have reviewed the forecasted circuit demand for TAT-10 provided by the Joint Applicants and conclude that TAT-10 is justified on the basis of demand. Based on this information, it does not appear that there will be adequate capacity available on existing and planned common carrier facilities to accommodate forecasted demand for digital cable facilities beyond 1992, the proposed in-service date for TAT-10. Currently, there is only one digital cable facility, TAT-8, in operation in the AOR. A second digital cable facility, TAT-9, is scheduled to become operational in mid-February 1992. By mid-August 1992, the proposed in-service date for TAT-10, TAT-8 capacity will be exhausted. In 1992 the Joint Applicants project a need for 7,090 MAUOs[14] on TAT-9 and 2,203 MAUOs on TAT-10, a total 9,293 MAUOs. The Joint Applicants collectively own 10,334 MAUOs in TAT-9. Although, without TAT-10, there would be sufficient capacity on TAT-9 to accommodate the needs of the Joint Applicants for digital cable circuits in 1992, 90% of TAT-9's capacity owned by the Joint Applicants would be utilized. The Commission has traditionally recognized that an 80% fill rate on a given facility is sufficient to justify the construction of additional facilities. Furthermore, without introduction of TAT-10 in 1992, the Joint Applicants' projected need for 12,649 digital cable circuits in 1993 (8,324 on TAT-9 and 4,325 on TAT-10) could not be accommodated on TAT-9 alone. By 1996, the Joint Applicants project their use of TAT-10 will increase to 8,119 MAUOs, approximately 77% of their owned capacity in TAT-10. Moreover, as set forth in more detail herein, introduction of TAT-10 in 1992 would allow for digital cable restoration of TAT-9 circuits.

2. Quality of Service

14. *Media and Route Diversity.* We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[15] Media diversity en-

hances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

15. We conclude that the introduction of TAT-10 as proposed will enhance route diversity, by adding another independent cable route. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore service via another digital cable facility would be enhanced.

16. With respect to media diversity, as of December 31, 1990 the Joint Applicants were providing a total of 31,701 circuits, consisting of 21,508 submarine cable and 10,193 satellite circuits to the countries and territories initially proposed to be served by TAT-10. While the Commission has never specified what a preferable cable/satellite ratio would be, the traditional approach to the concept of media diversity is that too much traffic over a particular medium could result in a significant disruption of traffic should that medium suffer an outage. Since a significant percentage of traffic in the AOR is routed via independent cable facilities in addition to satellite facilities, the failure of any one cable system would not likely result in a significant disruption in service since restoration could be effected through use of other cable facilities in addition to the satellite facilities.

17. *Restoration*. Restoration pertains to the ability to maintain service in the event of a facility outage. TAT-10 will provide restoration capability for AOR facilities in general, and particularly the digital TAT-8 and TAT-9 cable systems. Restoration of TAT-8 currently is accommodated through the use of INTELSAT capacity. The Commission has previously recognized that, although satellite capacity provides a satisfactory restoration alternative for cable, absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[16]

18. We find that the introduction of TAT-10 in 1992 as proposed would provide a needed restoration alternative for both TAT-8 and TAT-9. Should there be an outage on TAT-8 prior to introduction of TAT-9 in mid-February 1992, there would be no digital cable facilities available for restoration. Even with the advent of TAT-9, the projected demand for digital cable facilities would quickly fill TAT-9's restoration capacity for TAT-8. According to the projections of the Joint Applicants, by 1992, the first year of operation of TAT-9, 7,090 circuits (approximately 69% of the 10,334 circuits owned by the Joint Applicants in TAT-9) will be utilized. The additional capacity available with the introduction of TAT-10 in August 1992 would alleviate the impact of a service outage of either TAT-8 or TAT-9.

3. Cost Analysis

19. The Joint Application estimates the total cost of TAT-10 to be $300 million, and the capital cost per half-MIU to be $269,717 from the United States to Germany and $291,968 from the United States to the Netherlands. The estimated original capital cost of a 64 Kbit/s half-circuit (half-MAUO) is approximately $8,991 for the US-Germany segment and $9,732 for the US-Netherlands segment. The Joint Application notes that the unit cost of a virtual voice path in TAT-10 will be further reduced through the addition and use of digital circuit multiplication technology. A comparison of the costs for previously authorized digital cable facilities in the AOR demonstrates that TAT-10 will continue the trend of providing increased capacity while reducing circuit costs. For example, the cost of a TAT-8 half-MAUO between the U.S. and U.K. is $22,200. The cost for a similar unit of capacity on TAT-9 differed depending on the landing point, with a $10,000 per half-MAUO cost between the U.S. and the U.K., $13,000 between the U.S. and France and $14,000 between the U.S. and Spain.

4. Technological Innovations

20. In determining the need for additional facilities in a region, the Commission typically considers to what extent the proposed facilities will introduce new technology. In some instances, the effect of introducing new technology in the region is compelling, such as introducing digital fiber optic technology for the first time. In other cases, the technological innovations may not be as significant, such as improvements in laser technology in an area where digital fiber optic technology is already available. In this case, the need for TAT-10 is based on projected demand for digital cable circuits and not solely on technological innovation. Digital fiber optic cable technology is already available in the AOR on the TAT-8 cable system. We note, however, that there have been improvements in the digital technology since TAT-8. For example, TAT-8 employed 1.3 micron laser and 280 Mbit/s technology. TAT-9 improved on this technology by using 1.55 micron laser and 560 Mbit/s technology. The cumulative effect of these improvements is twice the capacity and cheaper per circuit costs. At the time of its introduction in August 1992, TAT-10 will utilize the same technology that TAT-9 will have introduced to the AOR in mid-February 1992.

5. Competition Considerations

21. We previously have recognized that the enhancement of both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[17] We find that introduction of TAT-10 will enhance intramodal competition in the AOR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of TAT-10 will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among a range of facilities further

allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

6. International Comity

22. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[18] Thirty-five telecommunications entities and carriers, including those from twenty-four foreign locations have agreed that the TAT-10 system design and 1992 service date will meet the projected service needs of their customers. Thus, we conclude that TAT-10 will promote international comity.

B. The Effect of Price Cap Regulation

23. Having determined that there is a need for the introduction of the TAT-10 cable system in late 1992, we also note that current competitive conditions and regulatory approaches provide the Joint Applicants with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[19] In our *TPC-4 Decision*, we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[20] Thus, the Joint Applicants' decision on what facilities to construct and when to place such facilities in service should be based on these factors.[21]

III. CONCLUSION AND ORDERING CLAUSES

24. In view of the foregoing, we find that the present and future public convenience and necessity require the construction of TAT-10 become operational in August 1992.

25. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[22] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

26. Accordingly, IT IS ORDERED that, pursuant to Section 214, 47 U.S.C. §214 (1982), application, File No. I-T-C-91-135, of the Joint Applicants (AT&T, HTC, IDB International, MCII, TRT/FTC, US Sprint and Worldcom) IS GRANTED, subject to the following terms, conditions, and limitations and the Applicants are authorized to:

(a) construct and operate the TAT-10 Cable System as proposed herein;

(b) acquire and activate capacity in the TAT-10 Cable System, on an ownership basis, in accordance with the interests indicated in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the TAT-10 Cable System;

(d) utilize digital circuit multiplication systems (DCMS) equipment to derive additional voice paths from the circuits (MIUs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the TAT-10 Cable System and aforementioned extension facilities for the provision of the Applicants' authorized telecommunications services.

27. IT IS FURTHER ORDERED that Applicants other than AT&T are authorized to acquire, by lease, appropriate connecting facilities between the Green Hill cable station and their respective operating offices in the United States.

28. IT IS FURTHER ORDERED that when a given Applicant seeks to acquire or transfer an ownership or IRU interest in the TAT-10 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

29. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the TAT-10 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

30. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accomodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to ensure the most efficient use not only of this cable system, but of all means of communications between the U.S. and the Atlantic Ocean Region.

31. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

32. IT IS FURTHER ORDERED that no Applicant herein that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107,[23] shall dispose of any ownership interest in TAT-10 capacity it is authorized to acquire in any way without prior authorization by the Commission.

33. IT IS FURTHER ORDERED that the Joint Applicants shall include TAT-10 facility use in the monthly Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceeding month.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants supplemented their Section 214 Application by filing individual circuit activation figures under separate cover and under a request for confidentiality pursuant to Sections 0.457 and 0.459 of the Commission's Rules. On July 26, October 2 and October 22, 1991, the Joint Applicants filed supplemental information, including revised Schedules to the C&MA reflecting revised ownership and cost-sharing arrangements and revised maps indicating changes in the cable system configuration.

[2] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[3] SLC's Petition to Deny was filed against the Joint Application for the TAT-10 Cable Landing License (File No. SCL-91-001). However, SLC contends that its petition extends to all TAT-10 and TAT-11 (File Nos. I-T-C-91-136 and SCL-91-002) applications. Without deciding the appropriate scope of SLC's petition, we note that SLC's arguments are addressed and the petition is denied in a companion order authorizing the Joint Applicants' cable landing license application for TAT-10.

[4] U.S. Sprint and Worldcom did not join in this Reply.

[5] In its letter dated July 18, 1991 to AT&T, the Commission noted that the Reply of Joint Applicants of July 22, 1991 would be considered an "Opposition" to which SLC would have the right to reply.

[6] Initially, all applicants may not be certified to serve directly all countries or territories which the facilities covered by the Application are capable of serving. Each individual applicant proposing an extension into such countries/territories by means of the TAT-10 facilities will be required to seek the appropriate authority as may be required at the time.

[7] *See* Attachment B to the Joint Application (filed May 28, 1991).

[8] Segment D will be a six fiber pair system. One fiber pair will be used to extend traffic between the Netherlands and the United States, one for transatlantic restoration purposes and the remaining four pairs for intra-european traffic.

[9] The total number of half-MIUs available to be assigned, which is 1008, represents the Notional Capacity. The remaining capacity between the Notional Capacity and the total Design Capacity is referred to as the Restoration Capacity and will be available to contribute toward transatlantic cable restoration.

[10] *American Telephone and Telegraph Co., et al.*, 4 FCC Rcd 8042 (1989).

[11] In a separate companion order, we also grant the Joint Applicants' request for a cable landing license (File No. S-C-L-91-001) pursuant to the Cable Landing License Act.

[12] *AT&T et al., (TAT-7 Order)*, 73 F.C.C. 2d 248, 256 (1979).

[13] *See, e.g., AT&T et al. (TAT-9 Order)*, 4 FCC Rcd 1129, 1131 (Com.Car.Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 F.C.C. 2d 353, 355 (1985).

[14] A MAUO is an equivalent voice channel (circuit) operating at 64,000 bits per second with an additional 9,684,656 bits per second required for multiplexing for a total of 73,684,656 bits per second in each direction at the System Interface locations. 30 MAUOs are the equivalent of 1 MIU.

[15] *See North Atlantic Facilities Planning*, 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.*, 67 F.C.C. 2d 451, 469 (1978).

[16] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[17] *Id.* at 3989.

[18] *See id.* at 3989.

[19] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Caps Order*).

[20] *See American Telephone & Telegraph, et.al.*, 4 FCC Rcd 8042, 8045 (1989) (*TPC-4 Decision*).

[21] *Id.* at 8046.

[22] *See* Section 214 Application, File No. I-T-C-91-135, at p.12.

[23] *See International Competitive Carrier*, 102 F.C.C. 2d 812, 822 (1985).

APPENDIX 1

SCHEDULE B
28-Oct-91

VOTING INTERESTS IN THE TAT-10 CABLE SYSTEM

PARTIES		PERCENT
APTT	(Austria)	0.47178
BT	(UK)	13.87577
DBP-T	(Germany)	24.01594
MCL	(UK)	2.90214
NPTT	(Netherlands)	5.10277
NT	(Norway)	0.66552
PPTT	(Poland)	2.15684
RTT	(Belgium)	1.14292
SFPT	(Finland)	0.82370
SPTT	(Switzerland)	2.33755
ST	(Sweden)	1.48680
TD	(Denmark)	1.02425
BTE	(Ireland)	0.15576
TLFN	(Spain)	1.42405
TPTT	(Turkey)	0.17981
AT&T		21.18264
DACOM	(Korea)	0.26972
HTC		0.08991
HKTI	(Hong Kong)	0.18723
IDB		0.27713
IDC	(Japan)	1.03605
ITDC	(Taiwan)	0.27713
ITJ	(Japan)	0.92872
KDD	(Japan)	1.44591
KT	(Korea)	0.09733
MCII		9.07897
OTC	(Australia)	0.87652
PLDT	(Philippines)	0.17981
TAS	(Singapore)	0.63675
TLMX	(Mexico)	0.24656
TLCB	(Canada)	2.09009
TNZI	(New Zealand)	0.18723
TRT/FTC		0.94356
USSP		3.02623
WCOM		0.08991
TOTAL		100.00000

APPENDIX 2A

SCHEDULE C-1
29-Oct-91

OWNERSHIP INTERESTS AND ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF SEGMENTS B AND D OF THE TAT-10 CABLE SYSTEM

PARTIES	SEGMENT B (PERCENT)	SEGMENT D (PERCENT)
APTT	0.49603	0.23734
BT	14.98016	0.00000
DBP-T	22.81746	35.60127
MCL	2.67857	5.06329
NPTT	4.06746	15.11076
NT	0.89524	1.34494
PPTT	2.28175	0.94937
RTT	0.89286	3.56013
SFPT	0.49603	0.79114
SPTT	2.57937	0.00000
ST	1.19048	4.35127
TD	0.89286	2.29430
BTE	0.00000	1.66139
TLFN	0.00000	15.18987
TPTT	0.19841	0.00000
AT&T	22.81745	5.37976
DACOM	0.29762	0.00000
ETC	0.09921	0.00000
HKTI	0.19841	0.07911
IDB	0.29762	0.07911
IDC	1.09127	0.39557
ITDC	0.29762	0.07911
ITJ	0.99206	0.31646
KDD	1.58730	0.07911
KT	0.09921	0.07911
MCII	9.52381	4.74684
OTC	0.59524	0.39557
PLDT	0.19841	0.00000
TAS	0.69444	0.07911
TLMX	0.19841	0.71203
TLGB	2.28175	0.23734
TNZI	0.19841	0.07911
TRT/FTC	0.99206	0.47468
USSP	3.27381	0.63291
WCOM	0.09921	0.00000
TOTAL	100.00000	100.00000

ESTIMATED RELATIVE COSTS OF SEGMENTS B AND D:	90.62500	9.37500

APPENDIX 2B

SCHEDULE C-2
29-Oct-91

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE
COSTS FOR SEGMENT A, SUBSEGMENTS A-1 AND A-2, SEGMENTS E AND F
OF THE TAT-10 CABLE SYSTEM

PARTICS	SEGMENT A (PERCENT)	SUBSEGMENT A-1 (PERCENT)	SUBSEGMENT A-2 (PERCENT)	SEGMENT E (PERCENT)	SEGMENT F (PERCENT)
APTT	0.00000	0.99806	0.47448	0.23734	0.00000
BT	4.76190	23.19841	0.00000	0.00000	0.00000
BRP-T	8.92857	34.72618	71.28713	76.60127	0.00000
CTL	0.00000	3.35714	0.00000	0.06329	10.12658
DBTT	0.19841	7.93651	0.00000	19.11076	80.62184
HT	0.00000	1.19048	2.68987	1.34494	0.00000
PPTT	0.00000	4.84349	1.89873	0.94937	0.00000
RTT	0.00000	1.78571	0.00000	3.36013	7.12025
SFPT	0.00000	0.99206	1.58228	0.79114	0.00000
SPTT	0.39683	4.76190	0.00000	0.00000	0.00000
ST	0.00000	2.38095	0.70253	4.35127	0.00000
TD	0.00000	1.78571	4.58861	2.29430	0.00000
UTE	0.00000	0.00000	0.00000	1.66139	3.32278
TLFN	0.00000	0.00000	0.00000	15.18987	30.37975
TBTT	0.00000	0.39683	0.00000	0.00000	0.00000
AT&T	42.26188	3.37304	3.62974	2.37976	7.12025
BACOM	0.39683	0.19841	0.00000	0.00000	0.00000
BTC	0.19841	0.00000	0.00000	0.00000	0.00000
BKTI	0.39683	0.00000	0.15823	0.07911	0.00000
IDB	0.59524	0.00000	0.15823	0.07911	0.00000
IDC	1.98413	0.19841	0.47468	0.39557	0.31646
ITDC	0.59326	0.00000	0.15823	0.07911	0.00000
ITJ	1.98413	0.00000	0.31646	0.31646	0.31646
KDD	2.97619	0.19841	0.15823	0.07911	0.00000
KT	0.19841	0.00000	0.15823	0.07911	0.00000
MCII	18.25397	0.79365	1.89873	4.74684	7.59494
OTC	1.19048	0.00000	0.15823	0.39557	0.63291
PLDT	0.39683	0.00000	0.00000	0.00000	0.00000
TAS	1.38889	0.00000	0.15823	0.07911	0.00000
TLNK	0.39683	0.00000	0.00000	0.71203	1.42405
TLSB	3.76984	0.79365	0.47468	0.23734	0.00000
TNZI	0.39683	0.00000	0.15823	0.07911	0.00000
TRT/FTC	1.98413	0.00000	0.15823	0.47468	0.79114
USBP	6.15079	0.00000	0.47391	0.47391	0.63291
WCON	0.19841	0.39683	0.00000	0.00000	0.00000
TOTAL	100.00000	100.00000	100.00000	100.00000	100.00000

TAT-10 CABLE SYSTEM
NILs ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND BORDEN (NOTE 1)

SCHEDULE B-1
29-Oct-91

GREEN HILL ACCESS PARTIES

BORDEN ACCESS PARTIES	AT&T	BT	DACOM	DBP-T	BTC	HCTI	IDB	IBC	ITBC	TTJ	KDD	KT	MCII	BPT	OTC	PLDT	SPTT	TAS	TLNK	TLGB	TNZI	TRT/FTC	USSP	WCON	TOTAL
APTT	2	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	5
AT&T	17	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	17
BT	42	24	0	0	0	0	0	0	0	0	0	0	42	0	0	0	0	0	0	0	0	0	0	0	122
DACOM	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
DBP-T	66	0	1	45	0	1	0	0	0	0	0	1	21	0	0	0	0	0	0	0	0	0	0	0	135
IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCL	21	0	0	0	0	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	25
MPTT	21	0	0	0	0	0	0	0	0	0	0	0	6	0	1	0	0	0	0	0	0	0	0	0	28
NT	3	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	4
PPTT	15	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	18
RTT	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	3
SFPT	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	3
SPTT	13	0	0	0	0	0	0	0	0	0	0	0	2	0	1	0	0	0	0	0	0	0	0	0	16
ST	6	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	8
TB	2	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	5
TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TPTT	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
USSP	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2
TOTAL	213	24	2	45	1	2	3	10	3	10	15	1	92	1	6	2	2	7	2	19	2	10	31	1	506

SCHEDULE B-2
29-Oct-91

TAT-10 CABLE SYSTEM
NIUs ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND ALIGNAR (NOTE 2)

GREEN HILL ACCESS PARTIES

ALIGNAR ACCESS PARTIES	AT&T	MCI	DMB	BOC	ITDC	ITJ	KDD	NCII	OTC	TAB	TLGB	TMJ	TRT/FTC	USSP	TOTAL
MCII	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
MPTT	21	1	1	1	0	1	1	4	1	0	3	1	1	0	36
RTT	2	0	0	1	0	1	1	4	0	0	0	0	0	0	14
TOTAL	23	1	1	2	1	2	1	12	1	1	3	1	1	4	54

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of C-Band Satellite	RM-7627
Orbital Spacing Policies to Increase	RM-7628
Satellite Video Service to the Home	

REPORT AND ORDER

Adopted: January 2, 1992; Released: January 15, 1992

By the Commission:

I. INTRODUCTION

1. Two petitions for rulemaking have been filed with the Commission requesting that it alter its orbital spacing policies for domestic fixed-satellites. Current policy provides that separations between satellites will be two degrees by the mid-1990s when all authorized facilities are expected to be launched and operating. The petitions request that spacings between at least some satellites be allowed to remain at three degrees to facilitate the use of smaller antennas for home reception of video programming.

2. The first petition was filed by the Satellite Dealer Forum and K-Sat Broadcasting (K-Sat petition). The second petition was filed by a group of twelve entities that includes satellite equipment manufacturers and retailers, satellite programming distributors, and a programming provider (GIC petition).[1] The petitions were opposed by a number of parties including licensees of satellites proposed to be located 3 degrees apart.[2] Based on the record compiled, we find that granting petitioners' requests for rulemaking would not be in the public interest because 3^0 orbital spacings would cause unnecessary costs, severe disruption, uncertainty and instability in the satellite industry and would not achieve the ultimate benefits sought by the petitioners. Accordingly, the petitions for rulemaking are denied.

II. BACKGROUND

3. The move to 2^0 spacing was initiated ten years ago when the Commission determined that the best way to accommodate increased demand for satellite transponder capacity would be to maximize the use of the orbit by providing for the launch of more satellites.[3] The Commission noted that this demand stemmed in part from the development of new and innovative equipment and services offered by an increasing number of entrepreneurs in the industry. It expressed concern that regulatory policies continue to assure availability of satellite capacity to satisfy current needs as well as encourage new entrants in this market. The Commission stated that it initiated the 2^0 spacing rulemaking at that time in order to resolve the question of orbital spacings prior to the launch of additional new or replacement satellites. It emphasized that the smallest practical orbital spacing should be selected in order to conserve the orbital arc.[4]

4. In 1983, the Commission adopted its 2^0 spacing policy.[5] In doing so, it recognized that an immediate implementation of reduced spacing in the C-band would pose serious difficulties and cause significant costs. It therefore decided on a transitional plan with 2^0 as an ultimate goal but with a longer implementation schedule to allow operators several years to amortize and upgrade or replace existing facilities.[6] The Commission also noted that the parties commenting in that proceeding conceded that spacings of less than three degrees were ultimately necessary to accommodate demand. It also noted that licensees preferred incurring the costs necessary to implement 2^0 spacing to the costs and delays of comparative hearings which might be used to choose among applicants if the demand for orbital locations exceeded their supply.[7]

5. Receive-only earth stations were deregulated in 1979 when the Commission established an optional licensing program for those desiring interference protection from terrestrial microwave facilities operating in the same band while allowing those not desiring such protection the right to use unlicensed facilities.[8] Most owners of home satellite earth stations (HSDs) choose not to license their equipment.[9] Because of their unlicensed status, the potential affect of 2^0 spacing on HSDs was not evaluated in *Reduced Spacing*.[10]

6. In 1985 and again in 1988 the Commission reaffirmed its commitment to 2^0 spacing when assigning orbital locations to new space stations.[11] The Commission referred to the uniform 2^0 policy as the "cornerstone of our orbital assignment policy" designed to maximize the

---

[1] Petitioners are: Channel Master Division of Avnet, Inc. (Channel Master); Chaparral Communications, Inc. (Chaparral); Consumer Satellite Systems, Inc. (Consumer Satellite); Earth Terminal TV, Ltd. (Earth Terminal); General Instrument Corporation (GIC); the National Rural Telecommunications Cooperative (NRTC); PrimeTime 24 (PrimeTime); the Retail Council of the Satellite Broadcasting and Communications Association (Retail Council); Satellite Receivers, Ltd. (Satellite Receivers); Satellite Sports Network (SSN); Warren Supply Company (Warren) and Winegard Company (Winegard).

[2] *See* Appendix A for list of Commenters.

[3] Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations, 88 FCC 2d 318 (1981) (*Reduced Spacing Notice*).

[4] *Id.*

[5] Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations, 48 Fed. Reg. 40233 (1983) (*Reduced Spacing*).

[6] *Id.* at para. 41.

[7] *Id.* at para. 18.

[8] Deregulation of Receive-Only Earth Stations, 74 FCC 2d 205 (1979).

[9] The Commission recently adopted a registration program for domestic receive-only earth stations to replace optional licensing for facilities where interference protection is desired. *See* 47 C.F.R. 25.131.

[10] *See Id.* at note 31.

[11] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228 (August 30 1985) (*1985 Assignment Order*); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988) (*1988 Assignment Order*).

number of satellites that could be authorized in order to assure that the demand for satellite services could be met.[12]

7. The entities authorized to construct and launch space stations in 1988 have begun to implement their proposed facilities.[13] Many of these satellites are scheduled to be launched in the next three years and are assigned to orbital locations with 2^0 separations although the satellites they are replacing are currently operating in locations spaced further apart.

8. Two groups have filed petitions for rulemaking requesting changes in our orbital spacing policies. The K-Sat petition lists four reasons why it is in the public interest to change our spacing policy from 2^0 to 3^0.[14] These are as follows: 1) 3^0 spacing would allow the use of smaller C-band reception antennas that would not be adversely affected by adjacent satellite interference, 2) smaller dishes would reduce zoning conflicts, 3) 3^0 spacing would allow for "an interim transition to Ku-band specialized packages while preserving high powered steerable C-band use", and 4) for "other unmentioned reasons". This petition does not contain elaboration or supporting information.

9. The GIC petition was filed by a group of entities with varying interests in the market for satellite delivered video programming. It requests the initiation of a rulemaking that would lead to the adoption of 3^0 spacing in certain portions of the arc at C-band as well as the adoption of any other changes that would facilitate the use of smaller earth stations. GIC asserts that demand for C-band transponder capacity has decreased since 2^0 spacing was adopted and, therefore, wider spacing between satellites providing entertainment video services can be maintained. GIC contends that 3^0 spacing will help the development of the HSD industry by allowing the use of smaller antennas. In reply comments, GIC clarifies its position and states that the petition is requesting maintenance of spacings at 3^0 for the life of currently authorized satellites carrying cable programming, *i.e.*, approximately a ten year period.

10. The GIC petition offers two alternative proposals for 3^0 assignment plans for satellites located in the western portion of the orbital arc.[15] Satellites of primary concern are those that carry video programming for distribution to cable systems as well as HSDs and that are currently assigned to locations between 137^0 W.L. and 125^0 W.L.[16]

11. Fourteen oppositions to the petitions were filed.[17] Other parties filed pleadings captioned as comments that expressed opposition to the petitions. Opponents include satellite operators, non-entertainment video users of satellite services and certain video programmers. Comments supporting the petition were filed by entities involved in the manufacture of HSD equipment as well as by some programming providers.

III. DISCUSSION

12. After balancing the benefits petitioners claim will accrue from their requested change against the costs and disruption the change would cause in the satellite industry overall, we conclude that instituting the proposed rulemaking would be contrary to the public interest. Both petitions fail to demonstrate sufficient reasons to justify the consideration of such a major policy shift. Maintaining 3^0 spacing, even in only part of the orbital arc, would not achieve the result sought by the petitioners because of technical limitations, would cause major costs, disruption and uncertainty in the satellite industry and would result in a substantial loss of regulatory flexibility.

A. Technical Considerations

13. GIC's position that 3^0 spacing should be permitted in certain portions of the arc is premised on certain technical assumptions regarding the feasibility of using four foot diameter antennas to receive video signals at C-band. GIC claims that advances in satellite technology now make the use of antennas four feet or less feasible as long as adjacent satellite interference can be adequately rejected. Petitioners assert that with 3^0 spacing, four foot antennas will be able to provide an acceptable quality picture but that if spacings are reduced to 2^0, antennas will have to be larger. They cite the fact that many of the new satellites recently authorized will be transmitting with 16 watts of power per transponder in contrast to the present facilities operating with 5 to 10 watts of power. They conclude that these higher power levels contribute to the feasibility of smaller dishes. In addition, petitioners assert that other advances in transistor technology make smaller HSD receivers more efficient.

14. Attached to the petition is a technical analysis supporting the contention that under 2^0 spacing conditions, an eight foot antenna is necessary to reject adequately adjacent satellite interference. This analysis purports to demonstrate that if satellites remain at 3^0 spacing, four foot antennas would provide adequate reception. Petitioners also indicate that they have been operating two experimental four foot HSD systems in California and have included the results of these experiments in their analysis.

15. Opponents dispute the petitioners' assertions that four foot antennas will provide an acceptable quality picture with 3^0 spacing and offer several technical analyses in support. Although their conclusions vary as to the minimum size antenna necessary, all question the petition's

---

[12] *1988 Assignment Order* at para. 5.

[13] Satellite construction schedules require long lead times. The space stations authorized in our 1988 orders were generally required to be constructed and launched by 1994. *See* general discussion of this policy in Licencing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985) at paras. 26-28.

[14] The petition is unclear about whether it is requesting a change in all portions of the arc in both bands, in the entire C-band orbital arc, or only in part of the C-band. C-band refers to 3700-4200 MHz downlink pared with 5925-6425 MHz uplink. Ku-band refers to 11.7-12.26 GHz downlink with 14 GHz uplink.

[15] The portion of the geostationary satellite orbital arc in question is that between 120^0 W.L. and 142^0 W.L. at C-band.

[16] These include GE's Satcom C-1, C-2, and C-3 satellites and Hughes's Galaxy V and Galaxy IR satellites. Four of these satellites are assigned locations within seven degrees of each other; Satcom C-1 at 137^0 W.L., Satcom C-4 at 135^0 W.L., Galaxy IR at 133^0 W.L. and Satcom C-3 at 131^0 W.L.

[17] Many oppositions and comments were addressed to both petitions and, unless specifically noted, in order to avoid confusion, we will refer to both petitions collectively in this order.

four foot claims.[18] Based on opponents' technical assessments, they conclude that larger antennas are necessary for adequate reception with 3^0 spacing. Opponents claim that petitioners' technical analysis fails to consider several relevant factors that impact on the feasibility of their proposal.

16. Based on an evaluation of the record compiled here as well as on an independent staff analysis, we conclude that even with satellite spacings of 3^0, a four foot antenna will provide a picture of only marginal quality, *i.e.*, a picture with discernable sparkles, in some portions of the country and will be incapable of providing even a marginal quality picture in other portions of the country.[19] In addition, more expensive consumer equipment may be necessary. In view of this conclusion and considering the anticipated costs and disruption and the potentially adverse impact that a change in policy would have on our regulatory flexibility, dismissal of these petitions is warranted.

17. Another technical concern raised by opponents stems from GIC's proposed assignment plans, both of which would create a situation where satellites with the same polarization would be adjacent to each other. Adjacent C-band satellites currently are required to have opposite transponder polarizations in order to reject interference under 2^0 spacing conditions.[20] Opponents assert, and petitioners do not refute, that even with 3^0 spacing, adjacent satellites must have opposite polarizations to avoid unacceptable interference. They note that the only way of avoiding this interference if satellites are co-polarized is to reduce transponder power substantially. Opponents conclude that this power reduction would adversely affect the ability of smaller dishes to receive signals and thus would be contrary to the results desired by the petitioners. They contend that changing the polarization of the satellites involved would be extremely costly, if not impossible at this stage. In reply, GIC states that satellite operators have been on notice that switchable polarization might be required and thus they should have constructed their satellites accordingly. It also questions the assertions by GE about costs and difficulties of changing polarization on partially constructed satellites.

18. We find that the problem of incompatible polarization is a serious flaw in both of the proposed assignment plans offered by petitioners. We agree that even with 3^0 spacing, satellites must be cross-polarized to operate effectively. There currently is no requirement that satellite operators construct their facilities with switchable polarization.[21] The present generation of spacecraft was authorized without requiring polarization switches and the 1988 Orbital Assignment Plan alternated assignments of horizontally and vertically polarized satellites. Any modification of this assignment plan will have to take polarization of adjacent satellites into account.[22]

19. An additional issue raised here involves the use of other frequencies to provide video services directly to consumers' homes. As opponents point out, spectrum in other frequency bands has been allocated exclusively to the provision of direct-to-home video service (DBS). Although this service is not yet in operation, it has the potential of providing video programming directly to consumers' homes using very small and inexpensive antennas.[23] In addition, at least two video programming services are scheduled to be offered in the Ku-band[24] where smaller antennas in the range of two feet are technically feasible.[25] Use of the Ku-band and DBS[26] in the bands established for that purpose will, according to opponents, accomplish the result sought by petitioners, *i.e.*, smaller antennas at less cost to the consumer, without causing the disruptions and costs anticipated by relocations in the C-band.[27]

20. GIC replies that direct-to-home video programming services in Ku-band have not been established and are only in the test marketing stage and thus are not at this time a viable substitute for C-band services which carry "name brand" programming designated for cable distribution.[28] GIC states that programmers are committed by contract to transponders in the C-band for at least ten years and thus Ku-band is not a realistic option for dish owners. GIC also questions whether DBS will ever be implemented.

21. Although neither Ku-band direct-to-home service nor DBS service are as yet fully established, we expect that as these technologies develop, they will become viable alternatives to Cband HSD service. Until that time, most HSD consumers are not faced with a choice of doing without service altogether. Instead, by using somewhat larger antennas, they, along with the other services using C-band, are ensuring that orbital spectrum is efficiently used and that all users can sucessfully co-exist.

---

[18] GTE states that some 5 to 7 foot antennas might work in some "best case" situations with 3^0 spacing. GE states that an 8 foot antenna would be required to achieve adequate results with 3^0 spacing. Hughes states that because no industry-wide standard for minimum quality video signals has been established, it cannot be determined if 4 foot antennas will perform adequately even with 3^0 spacings. The petition and our discussion is based on an analysis of the feasibility of 4 foot antennas. Standard antenna size feasible for most areas of the country under 2^0 spacing conditions is 8 feet to 10 feet.

[19] *See* Appendix B for the staff's technical analysis.

[20] *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations, 99 FCC 2d 737 (1985) at para. 6.

[21] Such a requirement is under consideration. *See* Amendment of Part 25 of the Commission's Rules and Regulations, 2 FCC Rcd 762 (1987).

[22] With respect to the costs involved in redesigning spacecraft, GE has provided in its comments a detailed explanation of the difficulties and expense involved in redesigning polarization in substantially constructed facilities and the record does not indicate that this description is incorrect.

[23] Comments of USSB.

[24] See GE Americium Communications, Inc., 3 FCC Rcd 6871 (1988) for discussion of establishment of "high-density" arc at Ku-band for direct-to-home video service.

[25] Prime Star has begun test marketing its Ku-band service in certain parts of the country and SkyPix is scheduled to begin service in the near future.

[26] The Commission has allocated the 12.2-12.7 GHz frequency band for DBS.

[27] With respect to zoning problems encountered by HSD owners, the Commission is currently considering a Petition for Declaratory Ruling filed by the Satellite Broadcasting and Communications Association of America specifically addressing these issues.

[28] See also Reply Comments of Chapparal contending that the program offerings on Ku-band are limited.

B. Cost and Disruption

22. The GIC petition asserts that circumstances have changed since the Commission adopted its 2^0 spacing policy. GIC states that when 2^0 spacings were adopted in 1983, demand for transponder capacity in the C-band was high. Since then, some of the traffic carried by satellites has been transferred to fiber optic cable. Several planned C-band systems never were implemented, and the ownership of fixed satellites has been consolidated and concentrated in a few major licensees. The pressure for C-band transponder expansion has disappeared, according to petitioners, and growth has been stronger in the Kuband. The GIC petition contends that the only growth at C-band has been in the video distribution market. GIC states that they are not requesting that 3^0 spacing be maintained indefinitely. Rather, their petition requests that 3^0 spacing be implemented for the life of the next generation of spacecraft, approximately ten years. They contend that the Commission should reevaluate the spacing situation when it considers future applications for space stations proposed to be launched after this ten year period.

23. The petition also states that while the need for 2^0 spacing has subsided, the benefits to be derived from the use of smaller receiving antennas have increased. It asserts that the HSD market is strongly affected by the size of the receiving antenna that can be used. GIC claims that with the 8 to 10 foot antennas currently used, it is anticipated that the market will expand from approximately 2.6 million to 4 million earth station owners over the next five to eight years. With dishes 4 feet or less, it estimates the market could grow to 10 million in the same time period. Smaller dishes will, according to the petition, eliminate some of the local zoning problems that many HSD owners are experiencing.

24. Opponents argue that the demand for C-band transponders is not declining. For example, one satellite operator states that the four primary cable satellites have been over 70 percent presubscribed prior to launch.[29] Other commenters assert that contrary to petitioners' claims, introduction of new technologies such as digital video compression will increase rather than decrease demand for C-band transponders by increasing opportunities for new services.[30] Because an expansion in spacing will decrease the number of orbital locations available for domestic satellite use,[31] commenters fear that a transponder shortage will result which will stifle the growth of new services as well as drive up the price of satellite capacity. Opponents argue that the GIC petition has failed to demonstrate that the market for C-band transponders is so diminished that a 20% reduction in capacity[32] that would result from increased spacing will not adversely affect services. They also state that relocations at C-band will impact Ku-band services and transponder availability as well.[33]

25. It is not clear, based on this record, whether there is now an excess of transponder capacity at C-band.[34] It is even less clear what the future use of this band will be.[35] In the past, new and innovative satellite services have been introduced at C-band as technology has developed and we have no reason to believe that this trend will not continue. Under these circumstances, we cannot conclude that demand is so reduced that restricting capacity to the extent suggested by petitioners is warranted.

26. Opponents of the petition also cite significant costs that they will be forced to incur if spacing policies are changed. Since adoption of 2^0 spacing in 1983, industry participants have been preparing for its full implementation and have already expended considerable time and money on transition plans to accommodate operations under 2^0 spacing conditions. Additional costs would be incurred if spacings were to be changed to 3^0 and operators had to adjust their equipment accordingly. These include the costs of repointing antennas[36] and modifying spacecraft currently under construction[37] Significantly, many of these opponents are participants in the HSD industry.[38]

27. GIC asserts that opponents should be required to document the costs and economic impact they claim will result from a change in spacing policies. Such documentation would include, according to GIC, contracts claimed to be disrupted. In addition, GIC challenges opponents to document costs of repointing antennas.[39]

28. Alascom states that a service that would be adversely affected by petitioners' proposal to relocate Aurora 2 would be telephone service to the bush communities of Alaska. Antennas serving these communities are not steerable and it would take two to four weeks to repoint

---

[29] Comments of GE.

[30] Comments of GE, Hughes. These parties caution that the introduction of digital compression technology will necessitate expensive installation of new ground equipment and that such expense may delay implementation. Commenters state that most major programmers have binding contracts for full transponders and that once compression techniques are available, the industry will use the resulting extra capacity to accommodate new services.

[31] Hughes states that the GCI petition's proposal will result in the loss of three orbital locations in the western portion of the arc.

[32] GE estimates that petitioners' plans will have this effect.

[33] Comments of GTE.

[34] USSB states that there is no evidence of a decrease in demand for C-band capacity. Hughes states that C-band transponders are heavily used. ARC states that demand varies at peak hours and that any measurement of usage conducted during off-peak hours must take this fact into consideration. IDB states that there is a shortage of C-band transponders for video services, particularly for occasional video use.

[35] Commenters argue that new technologies will be implemented at C-band.

[36] *See* Comments of ABC.

[37] *See* Comments of GE.

[38] *E.g.*, HBO and C-Span provide programming that is sold to HSD customers. GE and Hughes are licensees of satellites that serve cable as well as HSD customers.

[39] Specifically, GIC states that challengers should document the costs incurred as a result of relocations occasioned by the recent demise of Alascom's Aurora 1 satellite. When this satellite became nonfunctional, emergency measures were taken to relocate temporarily Alaskan telephone traffic until its replacement, Aurora 2, was launched. GIC claims that documentation of these costs will give an accurate indication of the actual expenses involved in repointing antennas.

them, assuming good weather. This process would cause temporary suspension of telephone service in these isolated areas.[40]

29. In addition, many opponents are concerned that relocation of satellites under GIC's proposals will prevent certain satellites from providing 50 state coverage.[41] For example, satellite users are concerned that both of the petitioners' proposed assignment plans require Aurora 2 to move from 139^0 to 142^0.[42] These users contend that this move would adversely affect the majority of radio networks using that satellite. They assert that they have contracts for the distribution of radio programming which are based on the satellite's ability to cover all 50 states and relocation would severely disrupt these business arrangements. They also state that these services must be carried on one satellite in order to be efficiently delivered.[43] GE states that if its satellites are relocated, it will cost $1000 to repoint each of its 3000 antennas used to provide radio programming.[44]

30. We agree with a major concern of opponents that a change in satellite spacing policies at this time will result in significant cost and disruption to an industry that is, by its nature, subject to substantial risks.[45] As one provider of video services stated," the very filing of the Petition perhaps jeopardizes or at least casts a cloud of uncertainty over the elaborate and complicated transition plans."[46] Petitioners' proposal that 3^0 spacing be imposed as a temporary measure will only compound the uncertainty generated by a policy shift that may be reversed in ten years.[47] We believe that the disruption and uncertainty that will be generated by increased spacing is not justified, especially where proposed changes will only assist a discrete segment of users to the detriment of other users and where the alleged benefits are speculative.[48] We also agree with those opponents who state that it is very late in the implementation process to be proposing a change in satellite spacings.[49]

31. On balance, based on the record before us, we find that the costs and disruption that would result from even a temporary change in our spacing policy would be significant.[50] Although we have stated that orbital locations are not assigned permanently and are subject to change upon thirty days notice,[51] we have also attempted to avoid unnecessary disruption and relocation in this highly capital intensive market.[52] In reaching this conclusion, we recognize the public interest potential of satellite delivered video programming services as a competitive alternative to cable,[53] but the result requested by the petitioners will cause potential economic harm to other users of satellite services and may not offer the benefits that petitioners predict.[54] Judging from this record, a change in satellite spacing is supported primarily by those involved in C-band video programming distribution directly to individual homes.[55] Other providers and users of satellite services are strongly opposed, including those operators of space stations that would be located 3^0 apart and who might derive some potential benefits from a relaxed interference environment.[56] Public interest considerations, based on an evaluation of the entire satellite industry, do not support granting these petitions.

C. Loss of Regulatory Flexibility

32. Another major concern articulated by opponents is that a change in spacing policy may adversely impact the traditionally flexible regulatory policies the Commission has applied to the satellite industry. Opponents cite the

---

[40] Comments of Alascom.

[41] *See, e.g.*, comments of Viacom, C-Span, GE, ABC and Alascom for additional concerns about 50 state coverage.

[42] *See, e.g.*, comments of ABC, Westwood One, Inc., CBS. Opponents say a satellite located at 142^0 W.L. will not be able to provide service to most of New England while GIC asserts that only the northernmost tip of Maine will be affected. Under one of petitioners' proposals, GE's Satcom C-1 would be relocated to 140^0 W.L. where GE states it will be unable to provide 50 state coverage. Our calculations suggest that service from locations west of 139^0 W.L. may be marginal in parts of New England.

[43] Comments of ABC.

[44] GIC cites information that the digital audio tape (DAT) technology used to deliver these radio services may be abandoned. However, this is not confirmed in the record and does not answer opponents' general concerns about disruption of radio services caused by relocations.

[45] For example, space station facilities requiring expenditures of approximately $100 million are subject to launch and in-orbit failures.

[46] Comments of HBO. GTE states that perceptions of predictability and stability are critical factors in consumer choices of telecommunications systems and that relocations could cause users to reject satellite-based facilities in favor of terrestrial facilities.

[47] ARC states that if companies invest in equipment that will be compatible with 3^0 spacing, it will be difficult and expensive to replace this equipment if spacings are changed back to 2^0 at a later date.

[48] Comments of AT&T and Alascom.

[49] *See* Comments of HBO. Hughes states that five of the satellites of most concern if 3^0 spacing is to be implemented will be launched by late next year and that any change in spacing will require costly in-orbit relocations. GE states that GIC's concerns should have been raised eight years ago in a petition for reconsideration of *Reduced Spacing*. GTE points out that although petitioners state that they have tried to minimize relocations, their plans do not take into account the phased-in launch schedules of the various satellites involved and the fact that not all orbital locations will be available at the same time.

[50] The burden is on the petitioner to demonstrate the justification for the institution of a rulemaking and the record here indicates that the costs of relocation of satellites on a scale requested by the Petitions would be substantial.

[51] *See, e.g.*, Hughes Communications Galaxy, Inc., 3 FCC Rcd. 6989 (1988) at para. 23.

[52] *See* GE American Communications, Inc., 3 FCC Rcd. 6871 (1988) at para. 11. See also comments of Hughes regarding the amount of investment necessary.

[53] *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962 (1990); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 6 FCC Rcd 3312 (1991).

[54] GIC submitted a market study with its reply comments that was based on a telephone survey of HSD retail dealers and reflects their opinion that they might sell more equipment if the size of the antenna were reduced. It is also questionable whether four foot antennas will provide adequate service under 3^0 spacing. *See discussion supra* at Section A.

[55] GTE states in reply comments that opposing parties comprise virtually all the domestic fixed satellite licensees, major users and resellers of satellite capacity and DBS licensees.

[56] *See, e.g.*, comments of Hughes and GE, operators of satellites that would be spaced at 3 under petitioners' proposals.

fact that if spacings are not uniform throughout the orbital arc, satellite locations can no longer be considered fungible.[57] Consequently, locations spaced 3^0 apart would be more desirable than those spaced 2^0 apart because of reduced mutual interference and comparative hearing procedures might be necessary to evaluate applicants for particular locations. In addition, reserving 3^0 locations for those involved in distribution of entertainment video might have the effect of establishing a monopoly for video service providers with little opportunity for entry or exit in the market without relocating facilities. Opponents argue that such an approach would not be consistent with the "open skies" policies traditionally applied to this industry which enable the Commission to accommodate expeditiously all qualified applicants[58] and enables all licensees to determine which services they will provide. GIC responds that because its proposed assignment plan is only temporary, hearings to authorize new facilities would not be necessary.

33. We believe that any spacing policy that establishes different interference environments for different classes of operators and users without significant public interest benefits would undercut the traditional flexibility that has been the basis of our regulation of the satellite industry. GIC's proposal that 3^0 spacing be instituted only as a temporary measure does not relieve the situation. Operators would still be under different constraints depending on the service they are offering for at least ten years. In addition, competing applications for particular orbital locations, even for replacement satellites, in the part of the arc where 3^0 spacing is in effect, might be mutually exclusive and thus subject to the cost and delay of hearing requirements. Absent the imposition of a moratorium on applications for the western arc at C-band for a limited time, there is no guarantee that such applications will not be filed in the next several years and that we would not be faced with the prospect of costly and time consuming comparative hearings as well as disruptive reevaluation of spacing policies. We also agree that a policy which establishes spacing based on the type of service offered at one point in time would have the effect of reserving orbital locations based on private business arrangements which might be changed. For example, satellites carrying video traffic today may be used for other services in the future.[59] Such a policy is inconsistent with our flexible regulatory approach to this industry.

34. Opponents also fear that a reduction in the number of orbital locations caused by the expansion of spacings will impact on the Commission's ability to accommodate new technologies either at C- or Ku-band.[60] They state that by changing the spacing of satellites at C-band, the number of hybrid locations available for assignment to satellites operating in both bands will be reduced because spacings will no longer be coincident.[61] Although GIC offers its opinion that hybrid satellite locations may not be in demand, noting that there are no currently pending applications for hybrids and that hybrids may be too heavy to launch economically, other commenters disagree. In particular, Hughes states that hybrid technology is economically efficient and cites its recent authorizations to consolidate four single-band space stations into two state-of-the-art hybrid space stations.[62] In addition, under both of GIC's proposals, one authorization, that of NEX's Spotnet 2 satellite, would have to be cancelled.[63]

35. Further, both of petitioners' proposed assignment plans would place a U.S. satellite at 122^0 W.L. instead of 123^0 W.L. and would reduce the space between the U.S. satellite and a Canadian satellite from 4.3 degrees to 3.3 degrees. The petition notes that this change may require bilateral negotiations between the U.S. and Canadian governments but indicates that there should be no technical objection from Canada and that any problems should be resolvable. In contrast, GTE, the operator of the satellite currently located at 120^0 W.L. and a participant in bilateral negotiations with Canada, strongly asserts that any renegotiations of the agreements in question would probably be unsuccessful.[64]

36. Based on the record before us, we conclude that a retreat from our long established policy of 2^0 satellite spacings would have a severe impact on our regulatory policies in this area. Although this impact might not, by itself, be determinative in deciding to dismiss the pending petitions, when coupled with the fact that such a change would result in substantial costs and disruption to the majority of satellite industry participants and with the significant questions that have been raised about the technical assumptions and feasibility of petitioners' proposals, it lends further support to our conclusion that consideration of a change in satellite spacing policies is not in the public interest.

IV. CONCLUSION

37. We conclude that grant of the petitions would not be in the public interest. Our technical evaluation of petitioners' proposals indicate that four foot antennas will not produce an acceptable quality picture under 3^0 spacing conditions and that higher cost consumer equipment

---

[57] See 1988 Orbital Assignment Order, *supra* note 11 at para. 3, for a general discussion of fungibility.

[58] Comments of Hughes.

[59] See comments of GTE regarding establishment of a monopoly for the video distribution business.

[60] Comments of Alascom.

[61] Comments of Hughes, GE, GTE.

[62] Hughes Communications Galaxy, 6 FCC Rcd 72 (1991), 5 FCC Rcd 3423 (1990). See also comments of GTE and AT&T regarding the benefits of hybrid technology.

[63] National Exchange (NEX) has filed for an extension of time in which to begin construction of this satellite, which is still pending. GE states that if NEX's request for an extension of time is denied, it would be interested in applying to use the hybrid location at 127^0 W.L. The authorization of another hybrid satellite which was assigned to a location in this portion of the orbital arc, Contelsat-2 at 128^0 W.L., was relinquished by GTE Spacenet Corporation after the petitions were filed. *See* Letter to Secretary from Terri B. Natoli, July 24, 1991. This letter also indicates that the operational life of ASC-1, the satellite that Contelsat-2 was supposed to replace, will be longer than expected and thus the relinquishment of the Contelsat-2 authorization will not necessarily result in a vacant orbital location in the near future.

[64] See Comments of GTE for description of difficulties involved in such international negotiations. Because such a move would impact on a trilateral agreement with the U.S., Canada, and Mexico, negotiations would also have to include the Mexican government.

will be required. In addition, establishing 3^0 spacing, even in only part of the orbital arc, will cause major costs and disruption to satellite licensees and to users of satellite services. Such costs include the necessity to repoint antennas, to modify spacecraft under construction and to modify long range operating plans. Relocations necessitated by 3^0 spacing would cause certain satellites to lose their ability to serve all 50 states and would adversely affect the delivery of certain services, contracts for which were based on 50 state coverage. Disruption to customers of satellite operators, including those providing essential telephone service, would be significant. Finally, a change to a 3^0 spacing policy would impact flexible Commission regulatory policies by establishing different user classes, by reducing the number of C-band and hybrid orbital locations and by necessitating the reopening of international treaty negotiations.

38. ACCORDINGLY, pursuant to Section 1.407 of the Commission's rules, 47 C.F.R. § 1.407, the petitions filed by the Satellite Dealer Forum and K-Sat Broadcasting and by General Instrument Corporation, et. al. are hereby denied.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments/Oppositions:

Oppositions:

ABC Radio Network, Inc. (ABC)
Alascom, Inc. (Alascom)
American Telephone & Telegraph Co. (AT&T)
ARC Professional Services Group, Inc. (ARC)
GE American Communications, Inc. (GE)
GTE Spacenet Corporation (GTE)
Hughes Communications Galaxy, Inc. (Hughes)
IDB Communications Group, Inc. (IDB)
International Family Entertainment, Inc. (IFE)
National Cable Satellite Corporation, d/b/a C-Span (C-Span)
QVC Network, Inc. (QVC)
United States Satellite Broadcasting Company, Inc. (USSB)
Viacom International Inc. (Viacom)
Westwood One, Inc. (Westwood One)

Comments:

CBS Inc. (CBS)
Home Box Office, Inc. (HBO)
National Exchange Satellite, Inc. (NEX)
The Space Segment Group of SBCA (SBCA)
Cascade Cable Systems
North Atlantic Satellite Systems
Cable TV Associates, Inc.

Reply Comments:

Chaparral Communications, Inc. (Chaparral) and Addendum

General Instrument Corporation (GIC)

GTE Spacenet Corporation

Home Box Office, Inc.

Hughes Communications Galaxy, Inc.

National Cable Television Association, Inc. (NCTA)

National Rural Telecommunications Cooperative (NRTC)

Space Systems/Loral (Loral)

Warren Supply Company (Warren)

National Cable Television Cooperative, Inc. (NCTC)

GE American Communications, Inc. Reply to Addendum

Congressional Correspondence:

Honorable Mike Synar

Honorable Rick Boucher

Honorable Jim Cooper

Honorable Billy Tauzin

Honorable Ralph M. Hall

Honorable Jim Slattery

Honorable Bill Richardson

TECHNICAL APPENDIX B

1. Petitioners assert that four foot antennas will produce a picture of acceptable quality under conditions of 3^0 spacing. Based on evaluation of the petitions' proposals, the oppositions, comments and reply comments, we conclude that several crucial technical factors have been omitted in petitioners' analysis. These include the following: 1) the effect of the voltage standing-wave ratio (VSWR) on the carrier-to-thermal noise (C/N) ratio; 2) the C/N expected to be received in the operating environment; 3) the carrier-to-interference plus thermal noise C/(I+N) ratio expected; and 5) the necessity of a higher cost commercial quality low-noise-block-converter (LNB). When these factors are taken into consideration, we conclude that the petitioners' proposals are not feasible.

A. The effect of VSWR on Carrier-to-noise ratio

2. Voltage standing-wave ratio (VSWR) is an electrical phenomenon resulting from the mismatch of the characteristic impedance between the low-noise-block-converter (LNB) and the antenna feed. This electrical phenomenon introduces additional signal loss between the antenna feed and the LNB and, consequently, increases the receiving system noise temperature.

3. As the petitioners assert, due to the rapid commercialization of the high electron mobility transistor (HEMT) in the last few years, it is possible for C-band LNBs to achieve lower noise temperature as low as 25 K, and 40 K LNB is rapidly becoming the new standard. The petitioners further state that a 4 foot antenna having an efficiency of 65% and an antenna temperature of 40 K, with the next generation domestic satellites with equivalent isotropically radiated powers (EIRP's) of 40 dBW, could produce a C/N of 10 dB at home receivers. The petitioners also claim that even currently operating domestic satellites with 5 to 10 watts of transmitter power can produce acceptable video signals for home viewing because a 7 dB of C/N is a minimum value for good quality video reception (FM-receiver-threshold).[65]

4. The petitioners also indicate that a 4 foot HSD system has been operating at Chaparral Communications in San Jose, California and a home installation nearby for over a year. The petitioners further claim that the power levels, antenna parameters, and LNB performance are all measured quantities and the performance is exactly as shown in the analysis.[66] We accept the fact that the systems are performing as claimed. However, the petitioners' analysis fails to take several factors into account in evaluating the HSD operating environment.

5. To evaluate the effect of the LNB upon performance, it is necessary to know how much noise it contributes to the total system noise in the received C/N. Based on our analysis, the LNB used by Chaparral Communications in its operational 4 foot HSD system must be a high quality professional unit with a VSWR range approximately between 1.2:1 to 1.25:1 and an antenna feed VSWR also in the same range. Using these estimates and the parameters identified in paragraph 3 above, the 4 foot receiving antenna gain-to-system noise temperature (G/T) ratio is about 13.6 dB which is identical to the number shown in Figure 2 of Attachment A to the petition. We have recently received technical specifications and cost information from LNB manufacturers and trade journals.[67] These indicate that the unit cost of a high quality professional LNB is several thousand dollars. This information also indicates that a commercial quality LNB with a typical VSWR of 1.3:1 costs approximately $550 and an HSD quality LNB with a typical VSWR of 3.0:1 costs less than $150. The corresponding 4 foot receiving antenna G/T for these two LNBs is 11.6 dB and 9.2 dB, respectively. For a satellite emitting an EIRP of 40 dBW, the received thermal noise video signal C/N for 4 foot antennas using professional, commercial and HSD quality LNBs is 10.0 dB, 8.0 dB, and 5.6 dB, respectively in an interference free environment. It should be noted that a commercial quality LNB could produce barely acceptable video signals because the current C/N for the FM-receiver-threshold level for a good picture is about 7 to 8 dB.[68] For an HSD quality LNB, the received C/N would not allow reception of acceptable video signals for home viewing because a 5.6 dB of C/N is below the FM-receiver-threshold level. Therefore, a 4 foot antenna with an HSD qual-

---

[65] Petition at 21 and Attachment at 4-05.

[66] Petition at Attachment and Chaparral reply comments at 6.

[67] LNR Communications, Inc., Locus, Inc., Tampa Microwave Lab, Inc., California Amplifier, In. and Via Satellite. The information obtained from these sources has been made part of the record in this proceeding.

[68] AT&T at 3 footnote. Petition at Attachment 4-05.

ity LNB will not provide reception of a clear video picture with any satellite spacings. Many commenters reach the same conclusion.[69]

B. Carrier-to-noise ratio in the operating environment

6. The petitioners assert that C-band satellite transmitting technology has changed. The next generation of C-band satellites will use amplifiers of up to 16 watts. The petitioners further assert that this power level, coupled with an improved LNB, means that HSD sizes of 4 feet or less will produce a good picture, provided that the antennas can reject interference from adjacent satellites.[70] This assertion is accurate provided that all the petitions' assumptions are true and the EIRP is at least 40 dBW. The petitioners also contend that the next generation domestic satellites will provide acceptable video reception by antennas 4 feet or less "over most of the country." [71] In order to clarify these assertions, we need to look at the expected C-band satellite environment.

7. Based on the technical information that we provided to the IFRB for international coordination purposes[72] and the technical information in the relevant domestic satellite application files, the expected C-band satellite EIRP environment is not as homogeneous as the petitioners claim.[73] Based on our examination, the western arc C-band satellite environment shows that the expected EIRP ranges between 36.2 dBW and 43.0 dBW for different parts of CONUS. The specific expected EIRPs for five domestic satellites in the western arc are illustrated in Attachment 1. These are extracted from the available spacecraft transmitting antenna gain contours and the corresponding maximum video signal peak power into the antenna.

8. The carrier-to-noise ratio is directly proportional to the EIRP from the satellite. Using the petitioner's 4 foot antenna, the commercial quality LNB as described in paragraph 5 and the EIRP from Attachment 1, the expected received video signal C/Ns are illustrated in Attachment 2.[74] The C/N values are for thermal noise conditions without interference from adjacent satellites. The result indicates that only two of the five satellites in the western arc that we analyzed could provide a video signal C/N level of 7 dB and higher for the entire CONUS coverage. The other three satellites provide C/N as low as 4.2 to 6.5 dB in many regions of CONUS. Based on the thermal noise C/N alone, the petitioners' claim of acceptable video performance for 4 foot antennas over most of the country is misplaced because a C/N of 4.2 to 6.5 dB can not enable the reception of a clear video picture.

C. Carrier-to-interference ratio

9. The petitioners claim that HSD sizes of 4 feet or less will produce a good picture, provided that the antenna can reject interference from adjacent satellites.[75] The petitioners state that "[a] 4 foot antenna has a beamwidth of 4.2 degrees. This means that when the 4 foot dish is pointed at the desired satellite, it will also be receiving the full signal from an unwanted satellite spaced 2 degrees away."[76] The petitioners further claim that 3 degree spacing will result in acceptable performance for 4 foot antennas.[77] Many commenters indicate that a 3 degree spacing environment in the western arc will not provide sufficient off-axis discrimination for acceptable performance for 4 foot antennas. [78] Our assessment also indicates that 4 foot antennas will fail to attain the inter-satellite discrimination necessary to produce an interference-free signal for HSD viewing over most of the country. Therefore, the petitioners' claim is misplaced.

10. In a homogeneous video satellite environment, the "carrier-to-interference (C/I) ratio at the receiving earth station is primarily determined by the apparent satellite separation as viewed from the earth, the corresponding receiving antenna off-axis discrimination and the polarization isolation factor. The petitioners indicate that the apparent satellite separation for San Jose, California is 3.4 degrees for satellites separated by 3 degrees in the geostationary-satellite orbit. The corresponding antenna isolation is 11 dB.[79] For the western arc satellites, the apparent satellite separation angle is smaller for other CONUS locations. Earth stations located in New England states, for example, have apparent satellite separation angle of about 3.16 degrees. The corresponding antenna isolation is only 9 dB. The apparent satellite separation angle for other locations is illustrated in the top row of Attachment 3 and the corresponding antenna isolation is illustrated in the second row. Assuming the earth station

---

[69] *See e.g.*, comments of GE at 10, GTE at 6.

[70] Petition at 11.

[71] Petition at 21-22.

[72] International coordination is conducted under the auspices of the International Telecommunication Union (ITU) and International Frequency Registration Board (IFRB) which is one of the permanent organs of the ITU with the responsibility to publish the coordination information and to record the coordinated satellite networks in the Master International Frequency Register. Coordination is intended to ensure that the operation of U.S. satellites will be protected from harmful interference by, and will not cause harmful interference to, other countries' satellites. The technical information sent to the IFRB is provided by the licensee pursuant to 47 C.F.R. Section 25.111(b) and conforming to these technical parameters is a condition placed on each spacecraft's authorization.

[73] Petition Attachment at Figure 2; Chaparral reply comments at Attachment.

[74] We concluded earlier that the 4 foot antenna with a HSD quality LNB (*i.e.*, LNB having a VSWR in the range of 3.0:1) will not enable reception of a clear video picture.

[75] Petition at 11.

[76] Petition at 21.

[77] Petition at 21 and Attachment at 4-07-09. Chaparral reply comments at 6.

[78] Comments of GE at 10, comments of GTE at 4, comments of Hughes at 3.

[79] Petition at Attachment 4-08.

antenna has a cross-polarization isolation of 10 dB,[80] the C/I for a single adjacent satellite is between 21 dB and 19 dB. See the fourth row of Attachment 3. The aggregate C/I is between 17.3 dB and 15.3 dB because, in a domestic satellite environment, there are adjacent satellite interference sources from both sides of the satellite. The expected aggregate C/I for the scenario is illustrated in the last row of Attachment 3. There are additional external interference sources that have not been taken into account, *e.g.*, terrestrial fixed-microwave and the 20 MHz offset co-polarized transponders.[81] These factors would further degrade the aggregate C/I.

11. Chaparral in its reply comments indicates that a C/I of 15 dB is considered "[n]early perfect - few noise sparkles - still below cable quality -perfect for home" and a C/I of 18 dB contains "[n]o interference visible at all."[82] Chaparral's experiment verified information provided to the Commission by the satellite industry in 1976.[83] That information indicated that "interference was first detectable with a protection ratio [C/I] of 18 dB, clearly noticeable at 16 dB, and became unacceptable at 14 dB." Therefore, based on this information, a 4 foot antenna will not be able to provide a video picture without any noise sparkles over most of the country since the estimated aggregate C/I is between 17.3 dB and 15.3 dB.

D. Carrier-to-interference plus thermal noise ratio, C/(I+N)

12. As we have demonstrated, a 4 foot antenna with a commercial quality LNB will provide a range of a video C/N between 4.2 dB and 11 dB. We have also demonstrated that the estimated aggregate C/I is between 15.3 dB and 17.3 dB. The composite total C/(I+N) is between 3.9 dB and 10.2 dB.[84] As noted by the petitioners, Chaparral and AT&T, a common FM-receiver-threshold is approximately 7-to-8 dB.[85] This threshold level is the minimum value for a good picture. The composite C/(I+N) for the five satellites is illustrated in Attachment 4. This information demonstrates that there will be many regions in CONUS unable to receive an acceptable video picture using a 4 foot antenna.[86] Furthermore, no single satellite in the scenario could provide acceptable HSD video reception in all regions in CONUS.

E. Cost of an effective system

13. GE's comments state that it received price quotations from a local HSD dealer for C-band equipment.[87] It indicates that the least expensive 10 foot antenna system was approximately $3000 installed and the price of a 4 foot antenna system would be $2700 installed, the $300 difference being attributable to the difference in the cost of antennas alone. Warren Supply Company (Warren) in its reply comments indicates that a 7 foot system costs between $1850 to $2000 and a 4 foot system would cost $200 less. Warren claims that the equipment "savings to consumers based on a $200 per unit savings with 850,000 systems a year, is $170 million dollars.[88] However, in order to make a 4 foot system work in the San Jose area, for example, the HSD quality LNB (a LNB having a VSWR around 3.0:1) needs to be upgraded to a commercial quality LNB (a LNB having a VSWR around 1.3:1).[89] Commission staff has received price quotations from LNB manufacturers and distributors. These do not include installation costs and indicate that a commercial quality LNB is approximately three times as expensive as an HSD quality LNB, a difference of approximately $400. Therefore, the petitioners' claims of lower costs and annual consumer savings possible with 4 foot HSD's appears inaccurate.

---

[80] 47 C.F.R. Part 25.209(2b). This rule applies to a transmitting antenna in the 6 GHz band. If a 4 GHz receiving antenna can not meet this standard, the cross-polarization isolation will be less than 10 dB.

[81] Comments of GTE, Appendix A at 1.

[82] Chaparral reply comments at Attachment A.

[83] Declaratory Ruling and Order, RM-2614 and RM-2725, FCC-1169 (released January 7, 1977).

[84] The carrier-to-interference plus thermal noise ratio is the effective aggregate signal level received by an HSD receiver. This ratio determines the quality of the video picture in an adjacent satellite interference environment.

[85] *See* notes 7 and 10.

[86] Acceptable picture implies that the video picture quality is "good" under the FM-threshold condition and there are no noise sparkles under adjacent satellite interference conditions.

[87] GE comments at 42.

[88] Petition at 25. Warren reply comments at 2.

[89] *See* para. 5, *supra*.

ATTACHMENT 1

EXPECTED SATELLITE EIRP FOR VARIOUS PARTS OF CONUS

Orbital Location (deg.WL)	Satellite Name	Pol (1)	Maximum EIRP (2) (dBW)	Approximate EIRP (dBW) in the Region of West Coast	Northern Plane States	New England	East Coast	Southern Florida & Texas
137	Satcom C-1	H	38.2	37.2	36.2	36.2	37.2	36.2
		V	39.0	37.0	38.0	38.0	38.0	37.0
135	Satcom C-4	H	41.5	39.5	39.5	39.5	40.5	39.5
		V	43.0	40.5	39.0	39.0	40.0	40.0
133	Galaxy IR	H	41.1	40.1	39.1	39.1	40.1	39.1
		V	40.5	40.0	38.5	38.5	39.5	38.5
131	Satcom C-3	H	43.0	41.0	41.0	41.0	42.0	41.0
		V	43.0	40.0	39.0	39.0	40.0	40.0
125	Galaxy V-W	H	41.1	39.1	39.1	39.1	40.1	39.1
		V	40.5	39.5	38.5	38.5	39.5	38.5

Note: (1) This is the type of polarization; H stands for horizontal and V stands for vertical.
(2) The maximum EIRP is at the transmitting antenna beam boresight.

ATTACHMENT 2

EXPECTED VIDEO SIGNAL CARRIER-TO-NOISE (C/I) RATIO AT THERMAL NOISE
WITHOUT ADJACENT SATELLITE INTERFERENCE

Orbital Location (deg.WL)	Satellite Name	Pol (1)	Maximum C/N (2) (dB)	Approximate C/N (dB) in the Region of West Coast	Northern Plane States	New England	East Coast	Southern Florida & Texas
137	Satcom C-1	H	6.2	5.2	4.2	4.2	5.2	4.2
		V	7.0	5.0	6.0	6.0	6.0	5.0
135	Satcom C-4	H	9.5	7.5	7.5	7.5	8.5	7.5
		V	11.0	8.5	7.0	7.0	8.0	8.0
133	Galaxy IR	H	9.1	8.1	7.1	7.1	8.1	7.1
		V	8.5	8.0	6.5	6.5	7.5	6.5
131	Satcom C-3	H	11.0	9.0	9.0	9.0	10.0	9.0
		V	11.0	8.0	7.0	7.0	8.0	8.0
125	Galaxy V-W	H	9.1	7.1	7.1	7.1	8.1	7.1
		V	8.5	7.5	6.5	6.5	7.5	6.5

Note: (1) This is the type of polarization; H stands for horizontal and V stands for vertical.
(2) The maximum C/N is at the transmitting antenna beam boresight.

ATTACHMENT 3

ESTIMATED AGGREGATE CARRIER-TO-INTERFERENCE (C/I) RATIO
FOR SATELLITES SPACED AT 3 DEGREES INTERVAL

	West Coast	Northern Plane States	New England	East Coast	Florida
Apparent satellite separation (deg.)	3.37	3.28	3.16	3.2	3.27
Receiving antenna isolation (dB) (1)	11.0	10.0	9.0	9.0	10.0
Assumed cross-polarization isolation (dB)	10.0	10.0	10.0	10.0	10.0
Single-entry C/I ratio (dB)	21.0	20.0	19.0	19.0	20.0
Aggregate C/I ratio (dB)	17.3	16.3	15.3	15.3	16.3

Note: (1) The entry is extrapolated from the Figure in the petition.

ATTACHMENT 4

ESTIMATED COMPOSITE CARRIER-TO-INTERFERENCE PLUS THERMAL NOISE, C/(I+N), RATIO (1)

Satellite Name	Pol (2)	Maximum C/(I=N) (dB)	Estimated Composite C/(I+N) ,dB in the Region of West Coast	Northern Plane States	New England	East Coast	Florida
Satcom C-1	H	(5.9)	(4.9)	(3.9)	(3.9)	(4.8)	(3.9)
	V	(6.0)	(4.8)	(5.0)	(5.5)	(5.5)	(4.7)
Satcom C-4	H	8.8	7.1	7.0	(6.8)	7.7	7.0
	V	10.1	8.0	(6.5)	(6.4)	7.3	7.4
Galaxy IR	H	8.5	7.6	(6.6)	(6.5)	7.3	(6.6)
	V	8.0	7.5	(6.1)	(6.0)	(6.8)	(6.1)
Satcom C-3	H	10.1	8.4	8.3•	8.1	8.9	8.3
	V	10.1	7.5	(6.5)	(6.4)	7.3	7.4
Galaxy V-W	H	8.5	(6.7)	(6.6)	(6.5)	7.3	(6.6)
	V	8.0	7.1	(6.1)	(6.0)	(6.8)	(6.1)

Note: (1) The entry enclosed by a set of parentheses is below a typical FM-receiver-threshold level of 7 db.
(2) This is the type of polarization: H stands for horizontal and V stands for vertical.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-231

In the Matter of

Amendment of Section 73.202(b),	RM-5094 RM-6706
Table of Allotments,	RM-5381 RM-7325
FM Broadcast Stations.	RM-5604 RM-7372
(Shreveport, Bastrop,	RM-6406 RM-7459
Homer, Mansfield,	
Ruston, Vivian and	
Jonesboro, Louisiana,	
El Dorado and Stamps,	
Arkansas, Atlanta,	
Henderson, Hooks and San	
Augustine, Texas.[1])	

THIRD REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 20, 1991; Released: January 14, 1992

By the Commission:

1. As a result of the decision of the U.S. Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), the Commission has before it the *Further Notice of Proposed Rule Making and Orders to Show Cause* in this proceeding, 5 FCC Rcd 920 (1990), setting forth eleven different proposals related to the request of James A. Reeder ("Reeder"), former licensee of Station KMJJ-FM (formerly KCOZ), Channel 261A, Shreveport, Louisiana, to upgrade to a higher class channel.[2] Twelve parties filed comments and nine parties filed reply comments.[3] After consideration of the comments and reply comments, we are substituting Channel 259C2 for Channel 261A at Shreveport, Louisiana, and modifying the license of Station KMJJ-FM to specify operation on Channel 259C2. We provide a background and discussion of this action as well as related changes in the Table of FM Allotments below.

BACKGROUND

2. In BC Docket No. 80-90, *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 132 (1983), *recon. denied* 97 FCC 2d 279 (1984), we created three additional classes of FM channels, Class B1, Class C1, and Class C2. In addition, we determined that a large scale rule making proceeding was necessary in order to respond to requests for new FM allotments and expedite service to the public. The resulting original *Notice of Proposed Rule Making* in this proceeding, 40 Fed. Reg. 11214, published March 26, 1984, listed 684 proposed FM allotments. The *Notice* also set forth special rules governing the consideration of counterproposals in this "omnibus" proceeding. Specifically, to be considered, a counterproposal was required to be mutually exclusive with a proposed channel allotment *and* to fit into one of five categories: (1) first or second aural service; (2) first local service; (3) first fulltime local service; (4) minority service; or (5) public radio service. *See* 49 Fed. Reg. at 11216.

Proposal 1

3. In response to the *Notice*, Reeder submitted a timely counterpropposal proposing a Channel 259C1 for Channel 261A substitution at Shreveport and modification of the Station KMJJ-FM license to specify operation on Channel 259C1. That upgrade proposal conflicted with the proposed Channel 260A allotment at Homer, Louisiana, and the proposed Channel 260A allotment at San Augustine, Texas. To avoid these conflicts, Reeder proposed the use of either Channel 278A or Channel 283A in lieu of Channel 260A at Homer, and Channel 281A in lieu Channel 260A at San Augustine. The Reeder counterproposal was returned by letter because it did not meet any of the five announced acceptance categories. Reeder filed a timely petition for reconsideration of the return of his counterproposal. After considering the Reeder petition for reconsideration as comments in the docket, the *First Report and Order*, 57 RR 2d 863 (1985), allotted Channel 260A to Homer, Channel 260A to San Augustine, and a conflicting Channel 258A to Ruston, Louisiana (instead of Channel 239A as originally proposed in the *Notice*).

Proposals 2 and 3

4. On February 25, 1985, Reeder filed a petition for reconsideration directed against the *First Report and Order*. In that petition for reconsideration, Reeder renewed his request for a Channel 259C1 upgrade at Shreveport. To effectuate this upgrade, Reeder proposed four changes in channels allotted in the *First Report and Order*. Specifically, he reiterated his request for the substitution of Channel 283A for Channel 260A at Homer, and requested Channel 223A for Channel 260A at San Augustine. In regard to other conflicting channels allotted in the *First Report and Order*, Reeder requested the substitution of Channel 239A for Channel 258A at Ruston, and Channel 238A for Channel 239A at Vivian, Louisiana. In addition, Reeder submitted an alternative proposal requesting a Channel 259C2 upgrade at Shreveport which would only require the channel substitutions at Homer and Ruston.

5. In a *Memorandum Opinion and Order*, 59 RR 2d 679 (1985), we denied the Reeder petition for reconsideration on the basis that the Reeder counterproposal had not met any of the five categories set forth in the *Notice*. In that action, we also stated that we would not substitute omnibus allotments in the absence of a "compelling need or

[1] The communities of Hooks, Texas, and Mansfield, Louisiana, have been added to the caption.

[2] SunGroup Broadcasting of Louisiana, Inc. is now the licensee of Station KMJJ-FM.

[3] See Appendix A for a list of parties filing comments and reply comments in this proceeding.

Commission error." That *Memorandum Opinion and Order* went on to state that an upgrade in channel did not constitute a compelling need. Reeder sought judicial review of this action as well as the earlier action in the *First Report and Order* returning his counterproposal.

Proposals 4 and 5

6. In a subsequent and separately filed petition for rule making, Reeder modified parts of his earlier proposals. Reeder proposed the Channel 259C1 upgrade at Shreveport along with the four substitutions of channels allotted in the *First Report and Order* in this proceeding. Specifically, Reeder requested the substitution of Channel 239A for Channel 260A at Homer (Proposal 1 and Proposal 2 had requested a Channel 283A substitution), Channel 231A for Channel 258A at Ruston (Proposal 2 had requested a Channel 239A substitution), Channel 238A for Channel 239A at Vivian, and Channel 223A for Channel 260A at San Augustine. Reeder also renewed his earlier request (Proposal 3) for a Channel 259C2 upgrade at Shreveport which only required channel substitutions at Homer and Ruston.

7. On January 24, 1989, the Court of Appeals rendered its decision in *Reeder v. FCC*. In that decision, the Court determined that the five limitations on counterproposals in the *Notice* and the "no substitutions" policy set forth in the *Memorandum Opinion and Order, supra,* were adopted without the requisite notice and opportunity for public comment in contravention of the Administrative Procedure Act, 5 U.S.C. 553(b) and (c).

Proposal 6

8. On April 11, 1989, Reeder submitted a "Supplement" looking toward a Channel 259C2 upgrade at Shreveport. This Supplement was specifically intended to facilitate the implementation of the remand by the Court. This Supplement suggested, in order to accommodate the Channel 259C2 upgrade at Shreveport, the substitution of Channel 285A for Channel 260A at Homer, and the substitution of Channel 223A for Channel 260A at San Augustine. In this regard, Reeder noted that a Channel 285A allotment at Homer would be short-spaced to Station KTOC-FM, Channel 285A, Jonesboro, Louisiana. Therefore Reeder proposed the substitution of Channel 238A for Channel 285A at Jonesboro, and modification of the Station KTOC-FM license to specify operation on Channel 238A. Reeder also referred to our action, conditioned on the outcome of the *Reeder* appeal, in MM Docket No. 86-87 upgrading Station KPYN, Channel 257A, Atlanta, Texas, to Channel 259C2. Reeder suggested a Channel 261C2 upgrade. In order to accommodate this upgrade, Reeder proposed the substitution of Channel 260A for Channel 261A at Henderson, Texas, and modification of the license of Station KGRI-FM, Channel 261A, Henderson, Texas, to specify operation on Channel 260A.

9. As a result of that Court decision, it was necessary to issue the *Further Notice of Proposed Rule Making and Orders to Show Cause* to consider the various Reeder proposals in their respective procedural postures. The *Further Notice of Proposed Rule Making and Orders to Show Cause* set forth each proposal. We discuss these proposals below.

DISCUSSION

Proposal 1

10. As stated above, in Proposal 1, Reeder submitted a timely counterproposal in this proceeding proposing the Channel 259C1 upgrade at Shreveport. To accommodate this upgrade, Reeder proposed the substitution of Channel 278A or Channel 283A for Channel 260A at Homer, and Channel 281A for Channel 260A at San Augustine. In this connection, we emphasize that neither the Court nor the Commission addressed the merits of this counterproposal. With respect to the merits of the original Reeder counterproposal in this proceeding, we concur with Noalmark Broadcasting Corporation and Ark-La-Tex Broadcasting Company that either the Channel 278A or the Channel 283A substitution at Homer would be short-spaced to Station KJLO, Channel 281C, Monroe, Louisiana.[4] Moreover, no party opposed our tentative view that it would not serve the public interest to delete the Homer allotment. In view of the above, we will deny the Reeder counterproposal in this proceeding.

11. The subsequent proposals by Reeder differ procedurally from Proposal 1. Proposal 1 was a timely counterproposal in MM Docket No. 84-231, and, therefore, not subject to the filing of competing proposals unless those proposals were filed by the May 14, 1984, comment date in MM Docket No. 84-231. In contrast, the subsequent Reeder proposals had not, prior to our most recent *Further Notice* in this proceeding, been included in or timely filed in response to a *Notice of Proposed Rule Making*. The *Further Notice of Proposed Rule Making and Orders to Show Cause* in this proceeding addressed the acceptability and the public interest benefits of these later proposals. First, it listed all the subsequent Reeder proposals and afforded interested parties the opportunity to file comments and/or competing counterproposals by the April 16, 1990, comment date. Second, it afforded interested parties an opportunity to comment on each of the subsequent Reeder proposals.

Proposal 2 and Proposal 3

12. We are denying Proposals 2 and 3 which were set forth in Reeder's petition for reconsideration. Both the Channel 259C1 and Channel 259C2 upgrade at Shreveport necessitated the proposed Channel 283A substitution at Homer. As discussed in paragraph 10, *supra*, such an allotment would be short-spaced to the licensed facilities of Station KJLO, Monroe, Louisiana. Also, the proposed Channel 238A substitution at Vivian, Louisiana is short-spaced to the licensed facilities of Station KAFX-FM,

[4] Noalmark Broadcasting Corporation, licensee of Station KAYZ, Channel 276A, El Dorado, Arkansas, and Oakdale Limited Partnership, former licensee of Station KICR-FM, Channel 254C2, Oakdale, Louisiana, filed comments in opposition to any Channel 278A allotment at Homer, Louisiana. In view of the fact that we are not allotting Channel 278A to Homer, these comments will not be further considered.

Channel 238C1, Diboll, Texas, as well as a proposal to allot Channel 238A to Stamps, Arkansas (RM-6706). As such, Reeder's proposals are unacceptable and are denied, consistent with long-standing rules, allotment policies and precedent. *See* Section 73.207 of the Rules; *See also Vass, North Carolina*, 45 RR 2d 1741 (BC Bur. 1979); *Portland, Tennessee*, 35 FCC 2d 601 (BC Bur. 1972); *Chester and Wedgefield, South Carolina*, 4 FCC Rcd 4503 (MM Bur. 1989), *app. for rev. denied*, 5 FCC Rcd 5572 (1990), *aff'd sub nom Chester County Broadcasting Co. v. FCC*, Case No. 90-149 (D.C. Cir. June 6, 1991).

Proposal 4 and Proposal 5

13. Proposal 4, set forth in a subsequent petition for reconsideration by Reeder, is not an acceptable proposal. To accommodate the Channel 259C1 upgrade at Shreveport, Reeder proposed the substitution of Channel 239A for Channel 260A at Homer. In turn, a Channel 239A allotment at Homer would conflict with the Channel 239A allotment at Vivian, Louisiana, and the proposed Channel 241C1 upgrade by Station KIXK, El Dorado, Arkansas (MM Docket No. 87-73). To remove the conflict with respect to Vivian, Reeder proposed the substitution of Channel 238A for Channel 239A at Vivian. As stated in paragraph 12, *supra*, a Channel 238A allotment at Vivian would be short-spaced to Station KAFX-FM, Diboll, Texas, and the proposal to allot Channel 238A to Stamps, Arkansas. In view of the short-spacing to Station KAFX-FM, we deny this proposal.[5]

14. We are also denying Proposal 5. This proposal was for a Channel 259C2 upgrade at Shreveport and was likewise set forth in the petition for reconsideration. To accommodate this proposal, it was only necessary for Reeder to propose the substitution of Channel 238A for Channel 239A at Vivian, and the Channel 239A for Channel 260A at Homer. As stated earlier, a Channel 238A allotment at Vivian would be short-spaced to Station KAFX-FM, Diboll, Texas.

Proposal 6

15. We conclude that grant of Proposal 6 would serve the public interest. This will provide for the upgrade at Shreveport as well as maximizing the number of related upgrades and new allotments. Therefore, we will substitute Channel 259C2 for Channel 261A at Shreveport, Louisiana, and modify the license of Station KMJJ-FM to specify operation on Channel 259C2.[6] In order to accommodate this upgrade, we are substituting Channel 272A for Channel 260A at Homer, Louisiana.[7] In addition, as discussed in paragraph 19, *infra*, we are allotting alternate channels in Atlanta, Texas, and El Dorado, Arkansas, which remove conflicts that would otherwise preclude the Shreveport upgrade. Specifically, we are substituting Channel 261C2 for Channel 257A at Atlanta, Texas. Originally, Station KPYN had proposed a conflicting Channel 259C2 upgrade at Atlanta. Second, we are substituting Channel 254C3 for Channel 257A at El Dorado, Arkansas. Station KLBQ had proposed a conflicting Channel 258C2 upgrade at El Dorado.

Jonesboro and Mansfield, Louisianna

16. As discussed in paragraph 8, *supra*, Proposal 6 proposed the substitution of Channel 285A for Channel 260A at Homer, Louisiana, in order to accommodate the Channel 259C2 upgrade by Station KMJJ-FM in Shreveport, Louisiana. To accommodate the Channel 285A substitution at Homer, it was necessary to substitute Channel 238A for Channel 285A at Jonesboro, Louisiana. To this end, we issued an *Order to Show Cause* to Jackson Parish Broadcasting ("Jackson Parish"), licensee of Station KTOC-FM, Channel 285A, Jonesboro, Louisiana, to show cause why its license should not be modified to specify operation on Channel 238A. In view of our action substituting Channel 272A at Homer, instead of the proposed Channel 285A substitution, it is no longer necessary to modify the Station KTOC-FM license to specify operation on Channel 238A.

17. Jackson Parish also filed a counterproposal in response to the *Further Notice* proposing the substitution of Channel 285C3 for Channel 285A at Jonesboro, and modification of its Station KTOC-FM license to specify operation on Channel 285C3.[8] This conflicts with a separate pending petition for rule making filed by De Soto Broadcasting Company, licensee of Station KJVC, Channel 224A, Mansfield, Louisiana, proposing the substitution of Channel 284C3 for Channel 224A at Mansfield, and the modification of its Station KJVC license to specify operation on Channel 284C3. We are considering both of these proposals as counterproposals in this proceeding.[9] In

---

[5] In Proposal 4, it was also necessary for Reeder to propose the substitution of Channel 231A for Channel 258A at Ruston, Louisiana. A Channel 231A allotment at Ruston would be mutually exclusive with the proposed Channel 230C2 upgrade by Station KTRY, Bastrop, Louisiana (MM Docket No. 87-242). As such, this proposal, looking toward a Channel 259C1 upgrade at Shreveport, conflicts with the proposed Channel 241C1 upgrade at El Dorado, the Channel 230C2 upgrade at Bastrop, and the proposal to allot Channel 238A to Stamps, Arkansas. There is nothing in the record in this proceeding which would justify, on a comparative basis, denying two upgrade proposals and a new allotment in order to accommodate a Channel 259C1 upgrade at Shreveport.

[6] The reference coordinates for the Channel 259C2 allotment at Shreveport, Louisiana, are 32-32-30 and 93-48-06. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) with respect to Station KGRI, Channnel 260A, Henderson, Texas.

[7] The reference coordinates for the Channel 272A allotment at Homer are 32-42-41 and 92-56-35. As stated in paragraph 3 of the Appendix to the *Further Notice*, we are permitted to allot a channel different from what was actually proposed in the *Further Notice*. *See also Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990).

[8] Jackson Parish also simultaneously filed a petition for rule making identical to its counterproposal. As a procedural matter, both of the Channel 285C3 upgrade proposals will be considered in the context of a counterproposal in this proceeding.

[9] Public Notice of these counterproposals was given on December 12, 1990. (Report No. 1832). Reply comments were required to be filed within 15 days of the Public Notice. Jackson Parish did not file its comments until January 7, 1991. Inasmuch as the late-filed reply comments merely state its continuing interest in the upgrade and do not delay resolution of this proceeding, we are accepting these late-filed reply comments.

response to the Public Notice announcing the acceptance of these counterproposals, Russ Robinson filed an expression of interest in the proposed Channel 284C3 allotment at Mansfield.

18. We are allotting Channel 284C3 to Mansfield, Louisiana, as a new allotment available for general application.[10] In light of the expression of interest of Russ Robinson in this allotment and the unavailability of an alternate allotment, we are unable to modify the Station KJVC license.[11] In view of the site restriction we are placing on the Channel 284C3 allotment at Mansfield, we are also able to substitute Channel 285C3 for Channel 285A at Jonesboro, Louisiana, and modify the license of Station KTOC-FM to specify operation on Channel 285C3.[12] We believe that a new Channel 284C3 allotment at Mansfield, Louisiana, and an expansion of the service area of Station KTOC-FM, Jonesboro, Louisiana, would both serve the public interest.

El Dorado, Arkansas, Bastrop, Louisiana, and Atlanta, Texas

19. On February 1, 1990, in a companion *Memorandum Opinion and Order* in MM Docket No. 84-231, we vacated three separate actions upgrading FM allotments which were expressly contingent on the outcome of *Reeder v. FCC*. 5 FCC Rcd 931 (1990). These three actions were a Channel 241C1 upgrade by Station KIXK, Channel 240A, El Dorado, Arkansas (MM Docket No. 87-73); a Channel 230C2 upgrade by Station KTRY, Channel 232A, Bastrop, Louisiana (MM Docket No. 87-242); and a Channel 259C2 upgrade by Station KPYN, Channel 257A, Atlanta, Texas (MM Docket No. 86-87). Because our decision concerning Reeder's proposals eliminates any potential conflict between Reeder's proposal to allot Channel 239A to Homer and the Station KIXK upgrade, we are reinstating the Channel 241C1 upgrade by Station KIXK, El Dorado, Arkansas.[13] We are also reinstating the Channel 230C2 upgrade by Station KTRY, Bastrop, Louisiana.[14] This action is possible because we have decided not to substitute Channel 230A at Hamburg, Arkansas, or Channel 231A at Ruston, Louisiana. With respect to Atlanta, Texas, we are substituting Channel 261C2 for Channel 257A, and modifying the license of Station KPYN to specify operation on Channel 261C2.[15] Originally, we had allotted Channel 259C2 to Atlanta. 2 FCC Rcd 431 (MM Bur. 1987). In view of the Court decision in *Reeder v. FCC*, it was necessary to vacate this upgrade. The Channel 261C2 upgrade at Atlanta avoids a conflict with the Channel 259C2 upgrade at Station KMJJ-FM, Shreveport. In order to accommodate the Channel 261C2 upgrade at Atlanta, it is necessary to modify the license of Station KGRI-FM, Channel 261A, Henderson, Texas, to specify operation on Channel 260A. To this end, we issued an *Order to Show Cause* to Dean Broadcasting, Inc., licensee of Station KGRI-FM. In view of the fact that Dean Broadcasting, Inc., did not respond to that *Order to Show Cause*, we conclude that this licensee has consented to the proposed modification of license.[16] We find that this modification would be in the. public interest because it would permit Station KPYN, Atlanta, Texas, to upgrade its facilities and serve a larger service area and greater population.[17]

Station KLBQ, El Dorado, Arkansas

20. In a separate proceeding, MM Docket No. 87-73, the staff dismissed a proposal by El Dorado Broadcasting Company (formerly Lowery Broadcasting Company), licensee of Station KLBQ, Channel 257A, El Dorado, Arkansas ("KLBQ"), proposing the substitution of Channel 258C2 for Channel 257A at El Dorado, and modification of the Station KLBQ license to specify operation on Channel 258C2. In order to accommodate this upgrade, it would be necessary to substitute Channel 241A for Channel 258A at Ruston, Louisiana, and Channel 230A for Channel 258A at Hamburg, Arkansas. Inasmuch as those substitutions involved omnibus allotments, the KLBQ proposal was dismissed pursuant to the "no substitutions" policy. 3 FCC Rcd 4840 (MM Bur. 1988). In light of the fact that the Court struck down that policy in *Reeder v. FCC*, and KLBQ timely sought reconsideration of that dismissal, it is now necessary to consider the KLBQ proposal on its merits.

21. We deny the proposed Channel 258C2 upgrade at El Dorado advanced by KLBQ. We are doing so in order to grant *three* other upgrades which would otherwise be precluded by a Channel 258C2 upgrade at El Dorado. Specifically, the proposed Channel 241A for Channel

---

[10] The reference coordinates for the Channel 284C3 allotment at Mansfield, Louisiana, are 31-57-05 and 93-53-08. This site is 18.9 kilometers (11.7 miles) southwest of Mansfield.

[11] *See* Section 1.420(g) of the Commission's Rules.

[12] The reference coordinates for the Channel 285C3 allotment at Jonesboro, Louisiana, are 32-06-30 and 92-51-10. This site is 18.8 kilometers (11.7 miles) southwest of Jonesboro.

[13] The reference coordinates for the Channel 241C1 allotment at El Dorado, Arkansas, remain 33-16-21 and 92-39-25.

[14] The reference coordinates for the Channel 230C2 allotment at Bastrop, Louisiana, remain 32-50-43 and 91-56-10.

[15] The reference coordinates for the Channel 261C2 allotment at Atlanta, Texas, are 33-07-47 and 94-06-15.

[16] *See* Section 1.87(d)(1) of the Rules. The modification of the Station KGRI-FM license to specify operation on Channel 260A does not require a change in transmitter site. The reference coordinates for Channel 260A at Henderson, Texas, are 32-07-30 and 94-48-00. In order to accommodate Channel 260A at Henderson, it is necessary to substitute Channel 223A for Channel 260A at San Augustine, Texas. San Augustine Cable TV, Inc., sole applicant for this allotment, will be permitted to amend its application (File No. BPH-880830MB) to specify operation on Channel 223A without loss of cut-off protection. The reference coordinates for the Channel 223A allotment at San Augustine, Texas, are 31-31-42 and 94-06-36. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicant may avail itself of the provisions of Section 73.213(c)(1) with respect to Station KJVC, Channel 224A, Mansfield, Louisiana.

[17] Modification of the Station KGRI-FM license to specify operation on Channel 260A permits us to grant upgrades for both Station KMJJ-FM, Shreveport, Louisiana, and Station KPYN, Atlanta, Texas. Otherwise, we would have had to consider these mutually exclusive proposals on a comparative basis. The licensee of Station KMJJ-FM has agreed to reimburse Dean Broadcasting, Inc., licensee of Station KGRI-FM, for costs associated with the substitution. Because the substitution is necessary to accommodate the Station KPYN upgrade as well, we require Ark-La-Tex Broadcasting, licensee of Station KPYN, to share in the costs on an equal basis. *See Circleville, Ohio*, 8 FCC 2d 159 (1967), and *York, Alabama*, 4 FCC Rcd 6923 (1989).

258A substitution at Ruston necessary to effectuate the Station KLBQ upgrade is mutually exclusive with a proposal by KIXK, Inc., licensee of Station KIXK, Channel 240A, El Dorado, Arkansas, in MM Docket No. 87-73, proposing the substitution of Channel 241C1 for Channel 240A at El Dorado, and modification of the Station KIXK license to specify operation on Channel 241C1. In addition, the proposed Channel 230A for Channel 258A substitution at Hamburg is mutually exclusive with the proposal by Jamie Patrick Broadcasting, Ltd., current licensee of Station KTRY, Channel 232A, Bastrop, Louisiana, in MM Docket No. 87-242, proposing the substitution of Channel 230C2 for Channel 232A at Bastrop, and modification of the Station KTRY license to specify operation on Channel 230C2. Finally, the proposed Channel 258C2 upgrade at El Dorado is mutually exclusive with both of the Channel 259C1 and the Channel 259C2 proposals advanced by Reeder for Shreveport. To avoid these conflicts, we are able to substitute Channel 254C3 for Channel 257A at El Dorado, and modify the Station KLBQ license to specify operation on Channel 254C3.[18] We believe that this expansion of the service area of Station KLBQ would be in the public interest.

Stamps, Arkansas

22. In the *Further Notice of Proposed Rule Making and Orders to Show Cause,* we proposed the allotment of Channel 238A to Stamps, Arkansas, as a new local service. A Channel 238A allotment at Stamps conflicts with the proposed Channel 238A substitution at Vivian, Louisiana. Billy F. Ratton, proponent for the Channel 238A allotment, filed supporting comments restating his intention to file an application for this allotment. Inasmuch as we are not substituting Channel 238A at Vivian, there is no longer any impediment to a Channel 238A allotment at Stamps. We believe that a new local service to Stamps on Channel 238A would serve the public interest. [19]

Hooks, Texas

23. We are substituting Channel 240C3 for Channel 240A at Hooks, Texas, and modifying the license of Station KLLI, Channel 240A, Hooks, Texas, to specify operation on Channel 240C3.[20] Texarkana Broadcasting, Inc., licensee of Station KLLI, submitted this proposed upgrade as a counterproposal in this proceeding. This upgrade conflicts with the existing Channnel 239A allotment at Vivian, Louisiana. To remove this conflict, Texarkana Broadcasting, Inc. proposes the substitution of Channel 287A for Channel 239A at Vivian. Upgrading the allotment at Hooks will permit Station KLLI to serve a larger service area and greater population. In order to accommodate this upgrade, we are substituting Channel 287A for Channel 239A at Vivian.[21]

24. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), 307(b) and 316(a) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective **March 2, 1992,** the Table of FM Allotments, Section 73.202(b) of the Rules, IS AMENDED for the communities listed below to read as follows:

Community	Channnel Nos.
El Dorado, Arkansas	227A, 241C1, 254C3, 276A
Stamps, Arkansas	238A, 263C2
Bastrop, Louisiana	230C2, 261C2, 277A
Homer, Louisiana	272A, 294C2
Jonesboro, Louisiana	285C3
Mansfield, Louisiana	224A, 284C3
Shreveport, Louisiana	229C, 233C, 243C1, 259C2, 266C, 275C2
Vivian, Louisiana	287A
Atlanta, Texas	261C2
Henderson, Texas	260A
Hooks, Texas	240C3

---

[18] KLBQ has also submitted a counterproposal proposing the substitution of Channel 254C2 for Channel 257A at El Dorado, and modification of the Station KLBQ license to specify operation on Channel 254C2. This proposal is short-spaced to Station KTUX, Channel 255C1, Carthage, Texas (137.7 kilometers instead of the 158 kilometers required by Section 73.207(b) of the Rules). Accordingly, this counterpropsal will be denied. In its comments, KLBQ stated that if its proposals for Class C2 upgrades are denied, it would accept the upgrade on Channel 254C3. The reference coordinates for the Channel 254C3 allotment at El Dorado are 33-12-27 and 92-41-10.

[19] The reference coordinates for the Channel 238A allotment at Stamps, Arkansas are 33-21-42 and 93-30-00. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicant may avail itself of the provisions of Section 73.213(c)(1) with respect to Station KCXY, Channel 237A, Camden, Arkansas.

[20] The reference coordinates for the Channel 240C3 allotment at Hooks, Texas, are 33-35-00 and 94-09-45.

[21] The reference coordinates for the Channel 287A allotment at Vivian, Louisiana are 32-56-15 and 93-56-00. North Cado Broadcasting Company was granted a constructiom permit for the Channel 239A allotment at Vivian on August 10, 1990, (File No. BPH-871022MB). That grant was expressly subject to the outcome of this proceeding and noted the possibility of a transmitter site change. North Cado Broadcasting Company filed reply comments objecting to any allotment at Vivian which cannot be accommodated at its already proposed transmitter site. This opposition is not premised on the unavailability of a site for a Channel 287A allotment, but on the fact that a Channel 287A allotment with the necessary site restriction would preclude use of its existing AM tower and force the relocation of the transmitter site to a rural area serving fewer persons. We will not deny an upgrade at Hooks that would bring new service to a population of 28,237 persons in order to accommodate a site preference at Vivian which is based on economic considerations. We also note that Channel 287A at Vivian, as a six-kilowatt Class A allotment, will actually provide service to 5,969 more persons than the three-kilowatt Class A allotment on Channel 239A at Vivian. Furthermore, with respect to the costs of modifying its construction permit and securing a new transmitter site, we do not believe that the public interest requires reimbursement to the holder of a conditional construction permit that can no longer use a preferred transmitter site. Present Commission policy limits such reimbursement to permittees and licensees. *See Circleville, Ohio, supra; See also Forest Lake, Brainerd and Morris, Minnesota,* 61 FCC 2d 113 (1967); *Hampton, Iowa,* 39 FCC 2d 452 (1973); *Kenton and Bellefontaine, Ohio,* 3 FCC 2d 598 (1966). In this instance, we will not expand the reimbursement requirement to permittees granted conditional construction permits.

San Augustine, Texas	223A

25. The window period for filing applications for the Channel 238A allotment at Stamps, Arkansas, and for the Channel 284C3 allotment at Mansfield, Louisiana, will open on **March 3, 1992,** and close on **April 2, 1992.**

26. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of SunGroup Broadcasting of Louisiana, Inc. for Station KMJJ-FM, Shreveport, Louisiana, IS MODIFIED to specify operation on Channel 259C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

27. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of El Dorado Broadcasting Company for Station KLBQ, El Dorado, Arkansas, IS MODIFIED to specify operation on Channel 254C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

28. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Ark-La-Tex Broadcasting Company for Station KPYN, Atlanta, Texas, IS MODIFIED to specify operation on Channel 261C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

29. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Jackson Parish Broadcasting for Station KTOC-FM, Jonesboro, Louisiana, IS MODIFIED to specify operation on Channel 285C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

30. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Dean Broadcasting, Inc., for Station KGRI-FM, Henderson, Texas, IS MODIFIED to specify operation on Channel 260A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BLH-831003AB except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-831003AB except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

31. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the construction permit of North Cado Broadcasting Company for Station KNCB, Vivian, Louisiana, IS MODIFIED to specify operation on Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in the authorization for Station KNCB except the channel as described above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all

respects with the authorization for Station KNCB except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

32. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Texarkana Broadcasting, Inc. for Station KLLI, Hooks, Texas, IS MODIFIED to specify operation on Channel 240C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

33. IT IS FURTHER ORDERED, That the action in MM Docket No. 87-73 modifying the license of Station KIXK, El Dorado, Arkansas, to specify operation on Channel 241C1 IS HEREBY REINSTATED.

34. IT IS FURTHER ORDERED, That the action in MM Docket No. 87-242 modifying the license of Station KTRY, Bastrop, Louisiana, to specify operation on Channel 230C2 IS HEREBY REINSTATED.

35. IT IS FURTHER ORDERED, That above-referenced counterproposal filed by James A. Reeder in MM Docket No. 84-231 (Proposal 1) IS DENIED.

36. IT IS FURTHER ORDERED, That the above-referenced proposals advanced by James A. Reeder and subsequent licensees of Station KMJJ-FM, Shreveport, Louisiana (Proposal 2 through Proposal 5) ARE DENIED.

37. IT IS FURTHER ORDERED, That the above-referenced proposal by El Dorado Broadcasting Company in MM Docket No. 87-73 for a Channel 258C2 substitution at El Dorado, Arkansas, and modification of the license of Station KLBQ, El Dorado, Arkansas, IS DENIED.

38. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Third Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Dean Broadcasting, Inc., Station KGRI-FM, Box 1400, Henderson, Texas 75652; North Cado Broadcasting Company, Station KNCB, PO Box 1072, Vivian, Louisiana 71082; and the applicant for the San Augustine allotment, San Augustine Cable TV, Inc., 4201 Farhills Drive, Austin, Texas 78731.

39. For further information concerning this proceeding contact Robert Hayne, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed comments and/or reply comments:

Comments

Texarkana Broadcasting, Inc.
Oakdale Limited Partnership
KIXK, Inc.
Metro Broadcasters, Inc.
Noalmark Broadcasting Corporation
Mediatronics Broadcasting, Inc.
El Dorado Broadcasting Company
Jackson Parish Broadcasting
SunGroup Broadcasting of Louisiana, Inc.
Billy F. Ratton
Ark-La-Tex Broadcasting Company
Tyler FM, Inc.

Reply Comments

North Cado Broadcasting Company
Jackson Parish Broadcasting
Ark-La-Tex Broadcasting Company
Texarkana Broadcasting, Inc.
Tyler FM, Inc.
El Dorado Broadcasting Company
Noalmark Broadcasting Corporation
SunGroup Broadcasting of Louisiana, Inc.
Oakdale Limited Partnership
De Soto Broadcasting Corporation
Russ Robinson

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 14, 1992

CARRIERS
FILE REVISIONS TO THEIR COST
ALLOCATION MANUALS

PUBLIC COMMENT INVITED

American Telephone and Telegraph Company and several local exchange carriers filed proposed revisions to their cost allocation manuals for the separation of regulated and nonregulated costs for the quarter ended December 31. 1991. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

American Telephone and Telegraph Company	AAD 92-1
Ameritech Operating Companies	AAD 92-2
Bell Atlantic	AAD 92-3
BellSouth Corporation	AAD 92-4
Centel Corporation	AAD 92-5
Cincinnati Bell Telephone Company	AAD 92-6
Lincoln Telephone	AAD 92-8
Nevada Bell	AAD 92-9
NYNEX Telephone Companies	AAD 92-10
Pacific Bell	AAD 92-11
Puerto Rico Telephone Company	AAD 92-12
Rochester Telephone	AAD 92-13
Southern New England Telephone Company	AAD 92-14
Southwestern Bell	AAD 92-15
United Telephone	AAD 92-16
U S West. Inc.	AAD 92-17

Parties may file comments on the proposed revisions to the cost manuals no later than **February 10, 1992.** Replies should be filed by **February 25, 1992.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan. FCC. Common Carrier Bureau. 2000 L St.. N.W.. Room 812. Washington. D.C. 20554 and the Downtown Copy Center (DCC). 1114 21st St.. N.W., Washington. D.C. 20036. (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St.. N.W.. Room 812. Washington. D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan at (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 14, 1992

CITIZENS UTILITIES COMPANY
OF KINGMAN, ARIZONA
PETITION FOR WAIVER OF SECTION 36.154(d)

Public Comment Invited

On June 19, 1991, Citizens Utilities Company of Kingman, Arizona (Citizens) filed a petition for waiver of Section 36.154(d) of the Commission's rules, to exempt Citizens from the need to adjust its 1991 Subscriber Plant Factor (SPF) to correct for its recently discovered erroneous calculation of 1989 and 1990 SPFs. Citizens states that it inadvertently misinterpreted the Commission's rules and calculated these SPFs without the offset for revenues recovered from the Universal Service Fund (USF). Citizens asserts that readjustment of its 1991 calculation to compensate for this error would not be in the public interest. Also in the record is a November 1, 1991, letter submitted by the National Exchange Carrier Association (NECA), providing further details on this matter.

Interested parties should file comments regarding the Citizens petition no later than **February 7, 1992.** Reply comments should be filed no later than **February 24, 1992.** Comments should reference AAD 91-30. A copy of each pleading should be sent to Jacqueline Spindler, FCC, Common Carrier Bureau, 2000 L Street, NW, Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for inspection and copying in Room 812, 2000 L Street, NW, Washington, D.C. copies are also available from DCC.

For further information contact Jacqueline Spindler, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 14, 1992

GTE TELEPHONE OPERATING COMPANIES FILE CONSOLIDATED COST ALLOCATION MANUAL PUBLIC COMMENT INVITED

On January 8, 1992, the GTE Telephone Operating Companies (GTE) filed proposed revisions to their cost allocation manual (CAM) for the separation of regulated and nonregulated costs. This proposed revision reflects the merger of GTE and the Contel Telephone Operating Companies (Contel) and eliminates a separate CAM for Contel. Parties may file comments on the proposed revisions to the CAM no later than **February 11, 1992.** Replies should be filed by **February 26, 1992.** Comments should reference AAD 92-7. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st Street. N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-10

In re Applications of

Wayne G. Mulligan, Richard D. Buckley, Jr., and Richard S. Korsen d/b/a RANCHO MIRAGE RADIO, A General Partnership	File No. BPH-870331MZ
HUGH R. PAUL	File No. BPH-870331PN
SUNDIAL RADIO BROADCASTERS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-870421MC
DANIEL P. MITCHELL	File No. BPH-870422MB
Isabell Drake d/b/a DRAKE BROADCASTING	File No. BPH-870422ME
ANNE K. WALLACE and WILLIAM F. WALLACE	File No. BPH-870422MJ

For Construction Permit for
New FM Station, Channel 258A,
Rancho Mirage, California

Appearances

Lawrence Bernstein and *F. Joseph Brinig*, on behalf of Hugh R. Paul; *Morton L. Berfield* and *John J. Schauble*, on behalf of Sundial Radio Broadcasters, A California Limited Partnership; *Lewis J. Paper*, on behalf of Daniel P. Mitchell, III; *Jerome S. Silber*, on behalf of Drake Broadcasting; and *James A. Gammon* and *A. Wray Fitch III*, on behalf of Anne K. Wallace and William F. Wallace.

DECISION

Adopted: January 2, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

Board Member BLUMENTHAL:

1. Before the Review Board are exceptions and related pleadings filed by the above-captioned applicants [1] to an *Initial Decision*, 6 FCC Rcd 2523 (ALJ 1991) (*I. D.*), by Administrative Law Judge Joseph Chachkin (ALJ), which granted the application of Anne K. Wallace and William F. Wallace (Wallaces) for a new FM station at Rancho Mirage, California. Oral argument was held before a panel of the Board on September 20, 1991.

2. The *I. D.* turned on the standard comparative issue. Pursuant to criteria employed thereunder, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*), the Wallaces received a decisional preference for their ownership/management "integration" proposal: 100% quantitative credit, enhanced by local residence/civic activities on a half-time basis since 1981; female ownership credit for Ms. Wallace (60%); and extensive past broadcast experience. [2] Hugh R. Paul (Paul) and Daniel P. Mitchell, III (Mitchell) similarly received 100% quantitative credit, but lacked the enhancements possessed by the Wallaces. Paul also received a very slight preference for proposing greater overall coverage, but that advantage was deemed minor because the proposed service areas were well served: five or more primary aural services. Drake Broadcasting (Drake) was awarded 66.6% quantitative integration credit, because one of its principals -- a 33.4% owner -- withdrew from the applicant after the date integration proposals were fixed for comparative purposes. [3] The final applicant, Sun Radio Broadcasters, A California Limited Partnership (Sundial), received no quantitative credit, although it claimed 100%, and, arguably, proffered the highest enhancements. The ALJ, however, labeled the application a sham, controlled by one of its purported "passive" limited partners, who -- the ALJ found -- would continue to control if Sundial's application were granted. Sundial also was assessed a very slight diversification demerit for the media interests of its impermissibly "active" limited partner.

3. In the exceptions, each of the applicants asserts its superiority, raising various arguments; however, because we agree with the ALJ's resolution of the case, we have confined our discussion to the decisionally significant exceptions: (1) Sundial's request for restoration of its claimed quantitative integration; and (2) the unsuccessful applicants' attack on the award of full integration credit to the Wallaces. [4] Based on our review of the *I. D.*, the underlying record, and the oral argument, we adopt the ALJ's findings of fact, except as modified herein, and affirm his grant of the Wallaces' application. We turn first to Sundial's application.

SUNDIAL RADIO BROADCASTERS, A CALIFORNIA LIMITED PARTNERSHIP

4. Sundial is a limited partnership, comprised of a general partner, Joyce Wade-Maltais, and two limited partners, Leonard E. Walk, and Philip K. Smith, Jr. *I. D.*, para. 23. Both Wade-Maltais and Smith have a 20% ownership interest in the applicant, and 60% is held by Walk and his wife as joint tenants. Wade-Maltais proposes to work full time as the station's general manager. *Id.*, para. 45. She is a black female with long-time residence in the service area. Wade-Maltais has participated in service area civic activities and possesses past broadcast experience. *Id.*, paras. 46-48 & n.7.

5. Although Wade-Maltais is nominally the active principal of the applicant, the ALJ concluded that the totality of the record evidence, detailed below, demonstrated that the partnership was, in reality, under Walk's control, and that the applicant, therefore, was not entitled to integra-

tion credit. *Id.*, paras. 90, 95. He found that Walk, an experienced broadcaster, initially conceived the venture, and obtained Smith's name from a friend in Los Angeles after inquiring about finding a person from the Rancho Mirage area, with whom he could file an application. *I. D.*, paras. 24, 26. After calling Smith, a land developer, and discussing his desire for a local person --preferably a minority -- who could head up the group, Smith contacted Wade-Maltais. *Id.*, paras. 27-30. Walk then met with Wade-Maltais, reaching an agreement whereby she would participate in a limited partnership. *Id.*, paras. 30-31. The ALJ noted that Walk gave Wade-Maltais exclusive control over the applicant even though she had no prior experience in managing any business and Walk had not talked to anyone other than Smith, a stranger, about Wade-Maltais' competence or character. *Id.*, para. 91. Walk recommended that she use his law firm. *Id.*, para. 31. The firm, which had assisted Walk in filing similar applications since 1976, drafted the limited partnership agreement, prepared the financial estimates, obtained the station's consulting engineers, and contacted the equipment leasing company. *Id.*, paras. 38, 92.

6. The limited partners will supply all of the funds for the prosecution of the application and for the construction and operation of the station. *Id.*, paras. 39, 94. Wade-Maltais is not obligated to pay any money for her 20% ownership interest, nor is she liable to the limited partners for any loss that she determines does not constitute gross negligence or gross misconduct. *Id.*, paras. 35-37, 40. She also understood that she would be indemnified for any action taken on behalf of the partnership in good faith. *Id.*, 40. Sundial's exceptions mainly disagree with the adverse conclusions derived from the facts.

7. *Discussion.* As a general proposition, an applicant is entitled to the percentage of quantitative credit that is commensurate with its voting ownership proposing to work full time in station management, *see generally, WHW Enterprises, Inc.*, 89 FCC 2d 799, 816 (Rev. Bd. 1982)(subsequent history omitted) -- the interests of limited partners (or non-voting shareholders) disregarded as having no authority to control the licensee, *see Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). Where, however, the applicant's conduct is demonstrably at odds with its described ownership structure, the Commission does not accept "at face value the applicant's claim . . . while ignoring the nonintegration of its passive owners in calculating the applicant's integration credit." *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990); *see also Coast TV*, 4 FCC Rcd 1786, 1787 (1989). The equity interests of nominally "passive" owners who have actively participated in prosecuting the application after the applicant has formally organized itself into either a limited partnership or two-tier corporation are attributed to the applicant, resulting in an overall diminution of the percentage of the specific proposal for which integration is claimed. *Royce*, 5 FCC Rcd at 7064. Additionally, where the applicant has "left fundamental uncertainty" as to the nature of its organizational structure so that "control of the applicant as between integrated and non-integrated principals cannot be reliably ascertained," the integration proposal will be completely discounted. *Id.*

8. Here, the instant Sundial application is virtually identical to a number of applications recently discredited as shams. *See, e. g., Pleasant Hope Broadcasting Co., L. P.*, 6 FCC Rcd 6553, 6556-6558 (Rev. Bd. 1991); *Evansville Skywave, Inc.*, 6 FCC Rcd 5373, 5374-75 (Rev. Bd. 1991). [5] In *Evansville*, we depicted the *modus operandi* of the archetype sham (6 FCC Rcd at 5375): "

> [An application filed] by a coterie of . . . entrepreneurs claiming to be merely "passive" investors, and who . . . purportedly place *exclusive* control of their applicant entity in the hands of a virtual stranger, one with little or no palpable stake in that application, economic or otherwise. [T]ypical of the breed, the allegedly "passive" investors suppl[y] all of the capital, utilize[] its regular engineers and lawyers, pre-prepare[] the corporate documents (with a prearranged equity split), whereas the supposedly "active" principal [is] left with little or no operational function other than those purely *post hoc* ministerial acts associated with certifying the application on behalf of the "passive" entrepreneurs.

And, in *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd by judgment sub nom. Southeast Florida Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. October 28, 1991), where nominally passive investors purportedly ceded exclusive control over the applicant to a virtual stranger, the Commission expressed a similar view (5 FCC Rcd at 5612):

> It is not credible that a group of experienced investors (including those with past broadcast ownership) would grant exclusive control of their station to a virtual stranger with no broadcast experience, who would make no investment in the station. On the facts before us, we fail to see any legitimate *quid pro quo* by [the stranger] for becoming general partner. We have in the past rejected such instances of "giving away the store" as unworthy of credence. *See KIST Corp.*, 102 FCC 2d 288, 292 (1985)."

Evansville and *Pleasant Hope* were deemed by the Board as stronger examples of shams than *Metroplex*, where 4% equity interest and exclusive control constituted "giving away the store," because the former cases involved 25% and 20% equity interests, respectively, along with the exclusive control. A disparate result is not justified on the facts here. *See also Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) (proposal unreliable in light of the "relatively casual" manner in which the general partner was recruited and his lack of financial stake); *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5602, at para. 22 (1991); *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498, para. 6 (1991).

9. Moreover, even if we were not to find the applicant a sham, the post-formation record reflects an impermissible level of activity on the part of the limited partners that requires their inclusion into the overall calculus of the applicant's integration proposal. Walk stated at deposition that he was contacted by Wade-Maltais subsequent to the signing of the limited partnership agreement to locate an appropriate transmitter site. *I. D.*, paras. 41-43. Smith also was drawn into the search when Walk's efforts proved futile. *Id.*, para. 42. Although Wade subsequently disavowed his damaging admission, his recantation was not predicated on documentation that refreshed his recollection. Tr. 410. It is significant that Smith also expressed a belief that the search occurred after the limited partner-

ship agreement was signed. *See* Mitchell Exh. 5, at 27. *Also compare* Wade-Maltais' testimony that the agreement was signed on or about April 3, 1987 (Tr. 370) *with* Wade Maltais' declaration that Sundial received written permission on April 6, 1987 to use the land for a transmitter site (Sundial Opposition to Petition to Enlarge Issues, filed May 1, 1990, at Exh. 4). [6] Thus, in light of the post-formation activity, Sundial would be entitled, at most, to 20% quantitative integration credit, even if its proposal were *bona fide*. *See Evergreen*, 6 FCC Rcd at 5601-5602, paras. 18, 23. [7] Because Walk has not been a passive principal, nor is likely to be one in the future, the ALJ correctly attributed his media interests to Sundial for comparative diversification purposes. *See Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-935 (1986). [8]

ANNE K. WALLACE AND WILLIAM F. WALLACE

10. The applicant is a general partnership, consisting of Anne and William Wallace; the Wallaces are married to one another. *I. D.*, para. 66. Anne Wallace owns 60 percent of the partnership, while her husband owns 40 percent. *Id.* She proposes to work as the station's full-time general manager, and Mr. Wallace will be its full-time sales manager and chief engineer. *Id.*, paras. 71, 79, 81. The Wallaces purchased a condominium at Rancho Mirage in 1981, intending to move there full time following the sale of stations KAAP-AM/FM, Santa Paula, California. *Id.*, para. 68. William Wallace had owned the AM facility since 1965, and the Wallaces jointly had owned the FM station since 1976. *Id.*, para. 67. The stations used the same studio and were jointly managed by the Wallaces until the sale. *Id.* Because of a series of problems concerning the sale, however, they were unable to relocate to Rancho Mirage on a full-time basis. They have resided there at least half time since 1981. *Id.*, paras. 67-68, 72. Ms. Wallace has participated in local civic activities, serving as the Rancho Mirage Chairman of the United Way of the Desert Campaign during 1985-1986. *Id.*, para. 74. The Wallaces have extensive past broadcast experience. *Id.*, paras. 75-78, 82.

11. The exceptions reiterate arguments made to the ALJ that full credit should not be awarded to the Wallaces because of two alleged deficiencies in their proposal: (1) William Wallace's role at the station will not be managerial; and (2) that Wallace will not adhere to his proposal on a permanent basis. Specifically, Wallaces' opponents argue that under paragraph 7 of the Wallace Partnership Agreement, William Wallace is not afforded any role in management or policy. That provision reads as follows:

> Management, duties, and restrictions: The following provisions shall apply with regard to the management of the business and affairs of the partnership.
>
> (a) Managing partner. The right to manage and conduct the partnership business shall be vested exclusively in Anne K. Wallace and all decisions affecting the partnership, its policy and management, including its employees, their employment and discharge, and their compensation and bonuses, if any, shall be made by Anne K. Wallace. Anne K. Wallace shall devote her attention and time to the conduct and supervision of the partnership business.
>
> (b) Other partner. William F. Wallace shall devote his entire time to the furtherance of the interests of the partnership business.

Mitchell Exh. 8, p.1. The exceptors further advert to Wallace's testimony (at Tr. 616) that he will devote 95 percent of his time at the station "selling and "presenting the station" to advertisers, as evidence that his duties will not be managerial. With respect to their contention that the application lacks the requisite permanence, the exceptors refer to paragraph 10(a) of the Partnership Agreement, which provision, it is claimed, was apparently inserted into the Agreement because of William Wallace's current "retirement" status. Drake Exceptions at 4. That provision reads as follows:

> Retirement and dissolution: The following provisions shall apply in the event of the retirement of a partner or termination of the partnership prior to any mutual termination.
>
> (a) Retirement. Any partner shall have the right to retire from the partnership at the end of any month. Written notice of his intention to retire shall be served upon the other partner at the office of the partnership at least 30 days before the end of the month.

Mitchell Exh. 8, p.2. The parties note that Wallace is 66 years old, has not been gainfully employed since 1981, and joined the application only because of his wife's wishes for him to do so. In light of the foregoing, the parties question his "present intention" to work at the station. In rejecting these arguments, the ALJ found that William Wallace's role would be managerial, construing paragraph 7 of the Partnership Agreement as simply conferring "ultimate" decision-making authority to Ms. Wallace, and noting that Wallace's position as sales manager is a position explicitly recognized as managerial by the *Policy Statement* (1 FCC Rcd at 395). *I. D.*, para. 89. Moreover, he found that the 30-day notice provision concerning retirement merely provided an orderly vehicle for terminating the partnership, adding that it was not indicative of either partners' "present intention." He also referred to William Wallace's testimony denying any intention to retire in the event of a grant of the application. *Id.*

12. *Discussion*. The Commission credits integration proposals only where the applicant has demonstrated that the specific principal's role involves policy-making and important management functions stressed in the *Policy Statement*, 1 FCC 2d at 395, as opposed to typical broadcast employee functions. *See Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4248 (Rev. Bd. 1991), at para. 29, and cases cited therein; *see also Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324 (Rev. Bd. 1985). Additionally, integration proposals are to be adhered to on a permanent basis. *See Policy Statement*, 1 FCC 2d at 395 n.6; *see also Victorson Group, Inc.*, 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991). Here, although superficially appealing, the arguments provide no convincing basis for overturning the ALJ's conclusions. It is clear from the evidence adduced at hearing that William Wallace proposes to function as the station's sales manager, formulating sales procedures and supervising sales personnel. Tr. 608-610, 612-613,

651-652. As properly reported by the *I. D.*, the position of sales manager is an explicitly recognized managerial position, *see Policy Statement*, 1 FCC Rcd at 395, and applicants with principals occupying that position have consistently been accorded credit predicated upon that participation, notwithstanding that significant sales activities have accompanied the sales supervision. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1617 (Rev. Bd. 1985), *recon. denied*, 102 FCC 2d 465; *see also Debra D. Carrigan*, 100 FCC 2d 721, 738 (Rev. Bd. 1985)(subsuequent history omitted). As long as the applicant sets forth a specific integration proposal, adheres to that proposal, and there is reasonable assurance that the plan will be carried out, integration credit is awarded. *See Royce*, 5 FCC Rcd at 7063. These criteria are met here.

13. Paragraph 7 of the Partnership Agreement concerning Ms. Wallace's position as the managing partner does not mandate a different result. Although the provision is plainly inartfully drafted, it is clear from the testimony that the Wallaces intended that Ms. Wallace have final decision-making authority on all station matters, including sales when there was a disagreement between the principals. Tr. 610, 648-649. The parties' reliance on *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952-3953 (Rev. Bd. 1988) (subsequent history omitted), for the proposition that parol evidence cannot overcome written documents is misplaced, because there the oral testimony was insufficient to prevail over the written contract [*i.e.*, several McDonalds' franchise agreements purportedly requiring full-time efforts to the restaurants] only because the applicant neglected to produce a witness or other evidence that would corroborate his assertion that no conflict existed by also working full time at the proposed station. Although the term "exclusive" as used in the Agreement could be construed as argued by Wallaces' opponents, we cannot say that the provision in the instant case is susceptible to only one interpretation. It has been explained by the parties to mean that Ms. Wallace has the "ultimate" decision-making authority should "push com[e] to shove," Tr. 649, and the "parties' mutual interpretation of an agreement is customarily favored." *Barry Skidelsky*, FCC 91R-115, released January 2, 1992, at para. 18, relying on WILLISTON ON CONTRACTS, THIRD EDITION, 623. Finally, we concur with the ALJ that the inclusion of the retirement provision in the Partnership Agreement does not dictate a finding that William Wallace will not adhere to his integration proposal. He testified that he is "looking forward" to working at the station (Tr. 607) and has no "present intention" to retire if they are awarded the construction permit for the station (Tr. 645). He stated that the provision was initially included in a "boilerplate type of document" and that he saw no reason why it should be eliminated. Tr. 645-646. The Wallaces are entitled to 100% qualitative integration credit. [9]

14. Paul would also diminish the weight of the enhancement credits awarded the Wallaces. He argues that the half-time figure for local residence at Rancho Mirage since 1981 is only an estimate; that his civic activities, detailed in paras. 17-18 of the *I. D.*, are superior to the Wallaces; and that his past broadcast experience equals or surpasses that of the Wallaces. We will not disturb the ALJ's findings. The Wallaces testified that they have spent at least half of their time since 1981 residing at Rancho Mirage, Tr. 542-543, 635-637, *see also* Wallace Exh. 1, and no contrary evidence was adduced. Additionally, Ms. Wallace pre-filing Rancho Mirage community involvement includes a position of leadership, which is entitled to greater weight than mere organizational membership. *See Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 (1991). The Wallaces' past broadcast experience is extensive, with William Wallace's managerial experience reaching back to the late 1940s, and his wife's role as assistant general manager commencing as early as 1965. That the Wallaces have not been directly involved in broadcasting since the 1981 sale of their stations is not significant since broadcast experience is not discounted merely because it is noncurrent. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 847 (Rev. Bd. 1981)(subsequent history omitted). In contrast, Paul's past residence and civic activities at Rancho Mirage commenced only after he filed his application, and, thus, are, entitled to minimal weight. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 (1991); *see also Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721, 724 n.8 (1991). Moreover, his past broadcast experience, although of longer duration than Ms. Wallace since the Wallaces terminated their supervision of their broadcast stations in 1981, has not been managerial, and is entitled to a lesser weight. *Cf. Barton Broadcasting Co.*, 104 FCC 2d 785, 790 (Rev. Bd. 1986); *Armendo Garcia*, 3 FCC Rcd 1065, 1068 (Rev. Bd. 1988).

15. *Comparative Summation.* The Wallaces have been awarded 100% quantitative integration credit, enhanced by local residence/civic activities, female ownership, and extensive past broadcast experience. Paul is the only other applicant entitled to the local residence/civic activities enhancement, but his credit is minimal since it occurred after the filing of the application. His broadcast experience is also of lesser weight. Thus, he lags behind the Wallaces even when Wallaces' credit for female ownership is factored in. Paul's preference for slightly better overall coverage is not sufficient to outweight Wallaces' integration proposal. *See* n.4, *supra*. Mitchell's sole enhancements are for broadcast experience and his proposal to move to Rancho Mirage. Drake only received 66.6% integration credit, but even if awarded 100%, only has enhancement credits for female ownership (66.6%) and past broadcast experience, and would follow behind the Wallaces' local residence/civic credits. Sundial received 0%. We therefore affirm the ALJ's award to the Wallaces.

16. ACCORDINGLY, IT IS ORDERED, That the Petition For Nunc Pro Tunc Acceptance Of Late-filed Consolidated Briefs And Exceptions To Initial Decision, filed June 13, 1991 by Drake Broadcasting IS GRANTED, and the exceptions ARE ACCEPTED; that the Motion For Correction to Transcript of Oral Argument, filed October 11, 1991 by Anne K. and William F. Wallace IS GRANTED; and that the Motion For Leave To Supplement Exceptions And Reopen The Record filed October 11, 1991, and supplemented October 15, 1991, by Daniel P. Mitchell, III IS DISMISSED as moot; and

17. IT IS FURTHER ORDERED, That the application of Anne K. and William F. Wallace (File No. BPH-870422MJ) for a new FM station at Rancho Mirage, California IS GRANTED; that the applications of Hugh R. Paul (File No. BPH-870331PN), Sundial Radio Broadcasters, A California Limited Partnership (File No. BPH-870421MC), Daniel P. Mitchell, III (File No. BPH-870422MB), and Drake Broadcasting (File No. BPH-

870422ME) ARE DENIED; and that the application of Rancho Mirage Radio, A General Partnership (BPH-870331MZ) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Rancho Mirage Radio, A General Partnership, failed to file exceptions to the *I. D.* 's denial of its application. Accordingly, its application is hereby dismissed for failure to prosecute, pursuant to 47 CFR § 1.276(f). *See Breaux Bridge Broadcasters, Limited Partnership*, 4 FCC Rcd 4995 (Rev. Bd. 1989).

[2] Full-time participation in station operation by owners is considered to be of substantial importance because it provides a desirable nexus between legal responsibility and day-to-day performance, as well as augmenting the likelihood of greater sensitivity to an area's changing needs and programming designed to serve those needs. *Policy Statement*, 1 FCC Rcd at 395.

[3] In a *Memorandum Opinion and Order*, FCC 90M-2473, released August 10, 1990, the ALJ accepted, for reporting purposes only, an amendment reporting the withdrawal. He rejected an argument that the applicant was entitled to 100% after the withdrawal, citing as support *Angeles Broadcasting Network*, 59 RR 2d 752, 756 (1985), *recon. denied*, 61 RR 2d 480 (1986); *High Sierra Broadcasting Inc.*, 96 FCC 2d 423, 430 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984); and *Las Misiones De Bejar Television Co.*, 93 FCC 2d 191, 196 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1481 (1984). We agree that the precedent fully supports the ALJ's ruling. *See also V. O. B. Incorp.*, 5 FCC Rcd 5872, 5874 para. 11 (Rev. Bd. 1990).

[4] Among the other exceptions are claims that the Wallaces should have received a diversification demerit for not submitting an exhibit detailing the extent of their other media ownership; that Paul's coverage preference should have been slight rather than very slight; that Mitchell should have been assessed a diversification demerit for ownership in a monthly travel magazine; that Paul's integration credit should have been reduced to zero because he will not be able to effectuate his commitment; and that misrepresentation, financial, and related issues should have been added against Paul.

Both exceptions having a potential bearing on the Wallace's comparative superiority, *i.e.*, coverage and diversification, are without merit. The Commission has previously held that small preferences, whether labelled slight or very slight, for covering already well served areas and populations are not as important as preferences for the qualitative aspect of integration proposals. *See Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4881 n.10 (1991). And as for diversification, the ALJ took official notice of the Wallace's Integration and Diversification Statement that they owned no other media interests; no one alleges here that the Wallaces have any other media interests. Technically, the Wallaces should have replicated in their direct exhibits their lack of other media interest, but we have previously dismissed as "non-serious," claims that diversification demerits should be assessed against applicants which simply omit a statement that they possess no other media interests. *See Santee Cooper Broadcasting Company of Hilton Head, Inc.*, 99 FCC 2d 781, 791 n.41 (Rev. Bd. 1984)(subsequent history omitted); *cf. Mabelton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6318, 6319 (Rev. Bd. 1990)(permitting applicant to reform exhibits to conform with Integration Statement). We perceive no reason for departing from previous practice here.

With respect to the remaining exceptions, the Wallaces would prevail comparatively even if the relief requested were granted. Accordingly, we have not reached those exceptions. *See Colonial Communications, Inc.*, 6 FCC Rcd at 2296 para. 3 (1991)("[a]n agency, like a court, need not decide questions which are not relevant to its decision," quoting *Deep South Broadcasting Co v. FCC*, 278 F. 2d 264, 266 (D.C. Cir. 1960)).

[5] Sundial, by way of contrast, relies on *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), as its model, where the Commission awarded full quantitative integration credit. We disagree. The Commission based its holding in *Mulkey* on the fact that the nominally active individual was obligated to repay a 5-year interest bearing promissory note even if the applicant were unsuccessful in securing the license. 4 FCC Rcd at 5521. Wade-Maltais, however, has no similar financial obligation to Sundial.

[6] *See* also additional post-formation activity in response to a petition filed by Drake on March 26, 1990, requesting site availability and related misrepresentation/lack of candor issues against Sundial. Pursuant to a request by Wade-Maltais, Smith contacted the property owners of the site, dispelled confusion alleged in the petition concerning the address of the site, and confirmed the continued availability of the site. *I.D.*, para. 44. Although Sundial argues that the response required Smith's declaration because only he had personal knowledge of the facts surrounding the status of the site at the time the application was filed, that argument begs the question, because, as correctly noted by the ALJ, Wade-Maltais was responsible to contact the site owners to clarify the matter. *Id.*, para. 93. She could have easily proffered Smith's declaration, assuming it were necessary to resolve questions bearing on his role in initially obtaining the site.

[7] The ALJ held also that the integration proposal was flawed because -- he said -- the limited partners can dissolve the partnership at will, without the consent of the general partners, and the limited partners can demand repayment of their loans at any time giving them *de facto* control over the applicant. *I.D.*, paras. 94-95. Sundial correctly notes, however, that the principals' testified that the general partner's consent is necessary to dissolve the partnership and that Section 24(e) of the limited partnership agreement provides that all provisions of the agreement are to be construed so as to fulfill the Commission's requirements for non-attribution of the limited partners for comparative purposes. Sundial's Exceptions at 19-21. As to the repayment of loans by the limited partners, Sundial adverts to Section 10 of the agreement, conferring authority solely on the general partner to determine when profits or income may be distributed. *Id.* at 19.

[8] But for the fact that our affirmance of the ALJ's denial of integration credit to Sundial effectively denies it this construction permit, we would remand this case to the ALJ on the basic qualifying issues of truthfulness and/or abuse of process. *See Evansville*, 6 FCC Rcd at 5373-5374, 5377 n.12; *Pleasant Hope*, 6 FCC Rcd at 6560 n.13; and *Shawn Phalen*, FCC 92R-1, adopted January 2, 1992.

[9] That Mr. Wallace is 66 years old and currently not gainfully employed provides no legal basis for disregarding his proposal. *See United Broadcasting Co., Inc.*, 94 FCC 2d 938, 956 para. 34 (Rev. Bd. 1983) (subsequent history omitted) (age irrelevant absent showing that principal's health will not allow him to

meet his commitment); *Swan Broadcasting Limited*, 6 FCC Rcd 17, 19 (Rev. Bd. 1991) (current unemployment is not pertinent to whether principal will effectuate her proposal).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-208

In re Applications of

ATLANTIC RADIO COMMUNICATIONS, INC.	File No. BPH-900116MS
GREAT AMERICAN COMMUNICATIONS CORP.	File No. BPH-900117MN
JOHN SENIOR BROADCASTING CORP.	File No. BPH-900117MP
JERSEY DEVIL BROADCASTING COMPANY	File No. BPH-900117MT
SEAIRA, INC.	File No. BPH-900117MU
SOUTHERN OCEAN BROADCASTING COMPANY	File No. BPH-900117MX
LD BROADCASTING LIMITED PARTNERSHIP (now PRESS BROADCASTING COMPANY)	File No. BPH-900117NA

For Construction Permit for New FM Station, Channel 289B1, Manahawkin, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. Before the Review Board are a Petition to Intervene and an Appeal, filed October 23, 1991 by Seashore Broadcasting Corporation (Petitioner). Petitioner seeks party status in this proceeding so that it may prosecute an appeal from a *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991 (*MO & O*) by Administrative Law Judge Arthur I. Steinberg (ALJ). [1] The *MO & O* approved a series of settlement agreements, granted the application of Press Broadcasting Company (Press) (formerly LD Broadcasting Limited Partnership (LD)) for a new FM station at Manahawkin, New Jersey, and terminated the proceeding. Oppositions to the intervention petition and appeal were filed by the Mass Media Bureau, and by the above-captioned applicants jointly on November 1 and November 7, 1991, respectively, and petitioner filed a consolidated reply on November 20, 1991. For the reasons set forth *infra*, we will deny the petition to intervene and dismiss the appeal.

BACKGROUND

2. Petitioner is the licensee of station WOBM-FM at Toms River, New Jersey, located approximately twenty miles north of Manahawkin. Jt. Opp. to Appeal at 1. It previously filed a petition to deny the application of Jersey Shore Broadcasting Corporation (Jersey Shore), one of the twelve applicants which filed for the instant frequency. Bureau's Opp. to Pet. to Intervene at 1. Petitioner argued, *inter alia*, that Jersey Shore had violated Section 73.3518 of the Commission's Rules, 47 CFR § 73.3518, by filing inconsistent applications. *Id.* Jersey Shore is currently the licensee of Station WJRZ(FM) in Manahawkin, New Jersey. Jt. Opp. to Pet. to Intervene at 5. The Commission, in designating the above-captioned applications for hearing, agreed with petitioner's argument, granting the petition in part, and dismissing Jersey Shore's application from this proceeding. *Hearing Designation Order*, 6 FCC Rcd 4716, 4717-4718 (1991) (*HDO*).

3. Unbeknownst to petitioner, however, the applicants submitted a joint request for approval of a universal settlement to the Commission prior to the release of the *HDO* (on July 31, 1991). Bureau's Opp. to Pet. to Intervene at 2. [2] The settlement agreements contemplated a grant of Press' application, and the dismissal of the other applications for valuable consideration from Press. *Id.* Jersey Shore was to receive an option, which, if exercised, would allow it to acquire the facility from Press in exchange for its present Manahawkin FM facility. *Id.* at 2-3. The joint request was not acted upon by the Commission because the *HDO* had been adopted (but not released) prior to the submission of the universal settlement. *Id.* at 3. In addition to dismissing Shore's application, *see* para. 2, *supra*, the *HDO* dismissed Press' application for similarly filing inconsistent applications. *HDO*, 6 FCC Rcd at 4718. To maintain the viability of the earlier settlement and to account for the *HDO's* dismissal of the proposed permittee, Press, the parties resubmitted their agreements to the ALJ (on August 16, 1991), followed by an amendment by LD to substitute Press as the applicant in the LD application. Jt. Opp. to Appeal at 8. The ALJ granted the amendment substituting Press as the applicant and approved the settlement agreements before him, except for one between Press and Jersey Shore. He referred that agreement to the Mass Media Bureau for appropriate action for want of jurisdiction to rule on the agreement, since Jersey Shore's application was not before him. *MO & O* at n.4. On September 24, 1991, one day after the release of the ALJ's *MO & O*, petitioner filed to intervene with the ALJ, accompanied by a consolidated opposition. The ALJ dismissed the petition as moot in light of his earlier order. *Order*, FCC 91M-2946, released September 27, 1991.

PETITION TO INTERVENE

4. Petitioner argues initially that it should be permitted to intervene in this proceeding because the Commission implicitly recognized its standing as a party in interest when it granted, in part, its petition to deny Jersey

Shore's application. It argues further that, because it has learned that Jersey Shore and Press have both attempted to negate the effect of the Commission's rulings in the *HDO* by proposing a settlement that would permit them to elect which facility they wish to receive, thus circumventing enforcement of the inconsistent applications rule, it now wishes to appeal the ALJ's *MO & O*. Finally, it excuses the untimeliness of its requested intervention by stating that it

> had no prior reason to seek intervention earlier, for its only concern in the proceeding -- the pending [Jersey Shore] application -- had been properly resolved [*i.e.*, dismissed].

Pet. to Intervene at 10. Petitioner represents that it only learned of the settlement proposals after being alerted by a *Public Notice* that Jersey Shore had filed a petition for reconsideration of its dismissal from this proceeding. It discovered the proposals when inquiring at the Commission about the reconsideration petition. *Id.* at 11. It claims that it would have complied with the 30-day filing requirement prescribed by the rules for intervention petitions had Jersey Shore served it with a copy of the reconsideration petition. *Id.* at 12.

DISCUSSION

5. Section 1.223 of the Commission's Rules, 47 CFR § 1.223, which governs petitions to intervene, provides in paragraph (a) that parties in interest not previously named by Commission:

> may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest . . . . Where the person's status as a party in interest is established, the petition to intervene will be granted.

Paragraph (c) of the rule, which along with paragraph (b), governs late-filed petitions, provides:

> [a]ny person desiring to file a petition for leave to intervene later than 30 days . . . shall set forth the interest of the petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section . . . . If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

6. In the instant case, petitioner has not satisfied the requirements prescribed by Section 1.223. Initially, the 30-day deadline for filing intervention petitions expired on September 11, 1991, nearly one and a half months prior to the filing of the instant petition. The Board has previously held that the failure to seek intervention earlier due to a lack of knowledge of the proceeding does not excuse a late filing. *See Pacifica Foundation*, 19 RR 2d 631, 633 (Rev. Bd. 1970). More important, petitioner's conceded sole "concern" in this proceeding has previously pertained to the application of Jersey Shore -- and still does, but that application was not before the ALJ, nor was the settlement agreement between Press and Jersey Shore with the option for Jersey Shore to eventually acquire the instant facility part of the agreements approved by the ALJ. [3] Thus, petitioner could not qualify as a party in interest *vis - a - vis* Press, even had it filed a petition in a timely fashion. Any objections it now has against the grant of Press' application come too late. Finally, petitioner has not shown how its participation would assist us here. There were no issues pending against Press at the time the ALJ issued his ruling, and petitioner has not set forth any proposed issues warranting its participation. It simply recites facts that are already known about Jersey Shore. That is no basis for intervention. *See Cleveland Broadcasting, Inc.*, 12 FCC 2d 1008, 1009 (1968). In light of our ruling on petitioner's intervention request, we do not reach its appeal. *See* Section 1.302 of the Commission's Rules, 47 CFR § 1.302 (only parties may appeal a ruling of the ALJ which terminates a hearing proceeding); *cf. Raveesh K. Kumra*, 6 FCC Rcd 4837, 4838 (Rev. Bd. 1991). [4]

7. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike Joint Opposition to Notice of Appeal, filed October 15, 1991, by Seashore Broadcasting Corporation IS DISMISSED as moot; that its Petition to Intervene, filed October 23, 1991, IS DENIED; and that its Appeal, filed on the same date, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] On October 3, 1991, petitioner filed a Notice of Appeal, pursuant to Section 1.302(b) of the Commission's Rules, 47 CFR § 1.302(b). A Joint Opposition to Notice of Appeal was filed on October 11, 1991 by the above- captioned parties, and petitioner responded by filing a Motion to Strike Joint Opposition to Notice of Appeal on October 15, 1991. We will dismiss the motion to strike as moot in light of our disposition.

[2] Three applicants did not participate in the settlement, but two had their applications designated for hearing. Those applications were subsequently dismissed by the ALJ, *see Memorandum Opinion and Order*, FCC 91M-2866, released September 19, 1991, and are not pertinent here.

[3] The above-captioned applicants report that the settlement agreement between Press and Jersey Shore was approved by the Mass Media Bureau's Audio Services Division by letter dated September 27, 1991, and that petitioner filed a petition for reconsideration of that action on November 5, 1991. Jt. Opp. to Pet. to Intervene at 2 n.2; Jt. Opp. to Appeal at 4 n.2. If Jersey Shore elects to exercise its option, and a Press/Jersey Shore

assignment application is actually filed, Seashore may assert at that time any rights that it possesses. Until then, its arguments against Jersey Shore are in the wrong forum and premature.

[4] Because we perceive no plain legal error, we will not review the merits of the ALJ's *MO & O* on our own motion. We have recently approved a similarly resubmitted and revised settlement agreement filed between the adoption and release dates of a hearing designation order. *See Judith O. and Larry R. Orkus*, FCC 91R-119, released January 2, 1992. There, as here, the proposed permittee's application was dismissed by the designation order, requiring the substitution of the principals from the dismissed application for the principals of one of the applications still extant. The filing of inconsistent applications does not automatically implicate an applicant's character. The sanction for such a violation is generally a simple dismissal of the latest-filed application, with the original application remaining grantable. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3494 (1987). Moreover, because the agreements were originally filed on July 31, 1991, and not substantially revised, this case is distinguishable from *SBM Communications, Inc.*, 6 FCC Rcd 5522 (1991), where the Commission held that settlement agreements filed one day after July 31, 1991, were subject to new rules, effective August 1, 1991, limiting settlement agreements to legitimate and prudent out-of-pocket expenses. *Settlement Agreements Among Applicants For Construction Permits*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991). The ALJ ruled here that the pre-August 1, 1991 settlement rules were applicable to the agreements before him. MO&O at n.7. *See also Judith O. and Larry R. Orkus*, at n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-387

In re Applications of

ROXANNE GIVENS	File No. BPH-871202MC
NANCY JEAN PETERSON	File No. BPH-871203MF
SOUTHWEST SUBURBAN BROADCASTING, INC.	File No. BPH-871203MH
CRIMIEL COMMUNICATIONS ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-871203MN
JH BROADCAST LIMITED PARTNERSHIP	File No. BPH-871203NF
ANNE M. COUNIHAN	File No. BPH-871203NQ
COVE COMMUNICATIONS, INC.	File No. BPH-871203NT

For Construction Permit for
New FM Station, Channel 289A,
Eden Prairie, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a "Motion For Stay And Appeal From Presiding Officer's Ruling Terminating The Proceeding," filed November 25, 1991 by N. Walter Goins (Goins).[1] Goins seeks a stay of the effective dates of two companion orders issued by Administrative Law Judge Richard L. Sippel (ALJ), which, in conjunction, approved a settlement agreement in the above- captioned proceeding; granted the application of Southwest Suburban Broadcasting, Inc. (Southwest Suburban), as amended, for the new FM facility at Eden Prairie, Minnesota; and terminated the proceeding. *Memorandum Opinion and Order*, FCC 91M-3151; *Order*, FCC 91M-3152, both released on October 25, 1991. Goins filed for the instant facility, but his application was dismissed by the ALJ after the latter granted a motion for summary decision adverse to Goins on a previously added financial issue.[2] In support of his motion, Goins asserts that he has not received "official notice" of the ALJ's action. Presumably, Goins' legal objective is "to prevent the irreparable loss of [his] asserted comparative hearing rights in the face of an unstayed and administratively final grant" to Southwest Suburban. *Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987).

2. We will deny the motion for stay. The mere fact that Goins is a former party to this proceeding is not a recognized legal basis for requesting review or a stay of the settlement agreement. *See Warren Price Communications, Inc.*, 6 FCC Rcd 4424 (1991); *Meridian Communications*, *supra*. As we noted in *Meridian*, 2 FCC Rcd at 5904 (citations omitted):

> [I]t is well-settled that former and potential applicants, without more, lack standing to intervene in hearing proceedings. This is particularly true where, as here, the proposed intervenor does not wish to challenge or participate in the proceedings presently pending before the forum (a settlement agreement), but rather is trying to vindicate a different interest pending elsewhere (reinstatement of its application by a different authority).

In any event, Goins' prophylactic measures in requesting the stay are unnecessary because, as a matter of law, the grant to Southwest Suburban cannot become final until Goins has exhausted all of the legal remedies relating to his own dismissal from this proceeding.[3]

3. ACCORDINGLY, IT IS ORDERED, That the Motion For Stay And Appeal From Presiding Officer's Ruling Terminating the Proceeding, filed November 25, 1991, by N. Walter Goins IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The pleading was informally referred to the Board by the Commission's Office of General Counsel on December 2, 1991.

[2] *Memorandum Opinion and Order*, FCC 90M-1921, released July 3, 1990; *appeal denied*, 5 FCC Rcd 5371 (Rev. Bd. 1990), *recon. dismissed*, 5 FCC Rcd 5905 (1990), *modified*, 5 FCC Rcd 7010 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2961 (1991), *recon. denied*, 6 FCC Rcd 6909 (1991).

[3] Goins improperly includes within his Motion a request for a stay of the effective date of the Commission's *Memorandum Opinion and Order*, 6 FCC Rcd 6909, denying Goins' petition for reconsideration of his dismissal from this proceeding, as well as a reiteration of arguments relating to a petition for special relief filed with the Mass Media Bureau. *See* Section 1.44(a) of the Commission's Rules, 47 CFR § 1.44(a). That rule prohibits the combination of requests for action by different officials in a single pleading.

[4] Prepublication copies of the document will be mailed to the remaining parties and to N. Walter Goins at the address indicated in his Motion: 931 Lakeshore Drive, Big Lake, Minnesota 55309-9588.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 85-36

In the Matter of

Review of Technical and Operational Requirements: Part 74-E Aural Broadcast STL and ICR Stations; and Part 74-F TV Low Power Auxiliary Stations.

ORDER
(Proceeding Terminated)

Adopted: December 31, 1991; Released: January 15, 1992

By the Commission:

1. The *Further Notice of Proposed Rule Making* [1] in this proceeding proposed to allow portable broadcast auxiliary TV pickup stations to use certain vacant channels in the UHF-TV spectrum on a secondary, non-interference basis for transmission of program material over limited distances. In particular, the *Further Notice* proposal would have permitted field crews to use vacant UHF-TV channels for Electronic News Gathering transmissions from a camera to a microwave vehicle for relay to the studio. Currently, such wireless camera operations are limited to microwave bands above 2 GHz. The proposal to permit wireless camera use on vacant UHF-TV channels in lieu of operation in the referenced microwave bands was expected to provide relief from interference encountered by receivers operating in close proximity to transmitters in the same microwave bands. Eligibility for the proposed uses was to be limited to TV broadcast licensees, TV networks and cable television entities [2] in order to limit such use to broadcast or broadcast related entities consistent with the purpose of this Broadcast Auxiliary Service.

2. Several months prior to the *Further Notice*, we greatly expanded the number of channels available to Low Power Auxiliary Stations (LPAS). [3] *See First Report and Order* in MM Docket No. 86-12, 2 FCC Rcd 345 (1987). However, during that time we did not authorize any equipment suitable for use on the newly available channels. In the *Further Notice*, we noted that there was no apparent method of coordinating LPAS operations and wireless camera operations, and expressed concern about potential interference if these fundamentally different devices were to be operated on the same channels. The *Further Notice* accordingly imposed a freeze on continued licensing of LPAS operation between 530 MHz and 806 MHz in the UHF-TV band pending the resolution of the issues involving wireless camera use of the same band that were raised in this proceeding. [4]

3. The comments filed in response to the *Further Notice* expressed either no support or only limited support for the use of wireless cameras operating in the UHF-TV spectrum. In particular, broadcast interests expressed satisfaction with current wireless cameras that operate in the microwave bands above 2 GHz and questioned the demand for more limited bandwidth equipment that would operate in UHF-TV channels. Although police departments and motion picture companies filed comments in favor of the proposal stated in the *Further Notice*, their support was conditioned on their being permitted to operate wireless cameras in the UHF-TV band. Because of the transient and intermittent nature of wireless camera operations, close cooperation among users is essential. However, the lack of a natural coordination facility and scarce enforcement resources leads us to conclude that granting access to the UHF television channels to police departments and motion picture companies should not be permitted. Further, the record does not establish that adoption of the proposed wireless camera use would be in the public interest. Accordingly, this proceeding will be terminated without prejudice.

4. In view of the preceding decision, we will also terminate the freeze on the authorization of wireless microphones on UHF-TV spectrum above Channel 23 (*i.e.*, above 530 MHz). Pursuant to Section 74.803(b) of our Rules, wireless microphones are authorized and operated strictly on a secondary basis to other primary (principally broadcast) services. In larger metropolitan areas, VHF-TV channels (which also may be used by wireless microphones) are used intensively for broadcasting and lower UHF channels often are shared with private land mobile services. [5] Available channels for wireless microphone use are further restricted by the co-channel spacing requirements of Section 74.802(b) of the Rules, particularly in larger urbanized areas. [6] This has resulted in reports of congestion which would be alleviated by making the upper UHF-TV channels available again for wireless microphone operation. [7] Thus, the public will benefit by our terminating the freeze.

---

[1] *See Further Notice of Proposed Rule Making*, 2 FCC Rcd 3129 (1987).

[2] *Ibid*, paragraph 12.

[3] The expression "Low Power Auxiliary Stations" (LPAS) usually denotes low power "wireless microphones" which are used to convey audio signals over short distances without using wires or cables. However, other permissible (but much less frequently used) devices include low power stations that are used for cue and control communications or to synchronize TV camera signals.

[4] *See Further Notice*, paragraph 15.

[5] *See First Report and Order* in Docket 18261, 23 FCC 2d 325 (1970).

[6] For example, LPAS licensees authorized in the frequency band 174 to 216 MHz in Zone 1, which includes most of the northeast United States, may not operate within 97 kilometers (60 miles) of a co-channel TV broadcast station.

[7] On January 14, 1991, a Petition for Further Review, Analysis and Consideration was filed by Vega -- a Mark IV Company that manufactures wireless microphones. Vega claims that it is nearly impossible for wireless microphones to operate in major markets on most of the UHF channels that are not covered by the freeze. In view of our decision to terminate the freeze, the Vega petition will be dismissed as moot.

5. Accordingly, pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, IT IS ORDERED THAT this proceeding IS TERMINATED without prejudice, THAT the freeze on wireless microphone and other Low Power Auxiliary Service operation above 530 MHz IS TERMINATED, and THAT the Vega January 14, 1991 Petition for Further Review, Analysis and Consideration IS DISMISSED.

6. For further information contact Hank VanDeursen at (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEGASTAR, INC. File No. I-T-C-91-108

Application for authority under Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of multipurpose, INTELSAT Business Service (IBS) and television services between the U.S. and AOR countries; to establish channels of communication via Pan American Satellite's PAS-1 satellite for the provision of international television service; and to provide transborder services between the U.S. and Mexico

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 31, 1991; Released: January 15, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-108 IS GRANTED and Megastar, Inc. is authorized to:

a) establish channels of communication between appropriately licensed earth stations in the U.S. and INTELSAT AOR satellites for the provision of Intermediate Data Rate (IDR) services between the U.S. and Mexico, Honduras, Guatemala, Brazil, Jamaica, Trinidad, Ecuador and the Republic of Ireland;

b) establish channels of communication between appropriately licensed earth stations in the U.S. and INTELSAT AOR satellites for the provision of IBS between the U.S. and those countries listed in Comsat's tariff for IBS;

c) establish channels of communication between appropriately licensed earth stations in the U.S. and INTELSAT AOR satellites for the provision of international television service between the U.S. and those countries listed in Comsat's tariff for such service;

d) establish channels of communication between appropriately licensed earth stations in the U.S. and the PAS-1 satellite for the provision of international television service between the U.S. and those countries which PAS is authorized to serve; and

e) establish channels of communication between appropriately licensed earth stations in the U.S. and the Mexican Morelos satellite for the provision of transborder services between the U.S. and Mexico consistent with consultations under Article XIV(d) of the INTELSAT Agreement.

3. IT IS FURTHER ORDERED that Megastar, Inc. is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

4. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

5. IT IS FURTHER ORDERED that the authority granted herein for the Megastar, Inc. to establish channels of communication between the earth stations in the U.S. and the PAS-1, INTELSAT and Morelos satellites does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

6. This authorization is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-43

In re Applications of

SUNSHINE BROADCASTING, INC. File No. BPH-870625MI

HARTSVILLE BROADCASTING CO., INC. File No. BPH-870629NC

For Construction Permit for
New FM Station, Channel 253A,
Hartsville, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a Petition for Reconsideration of our *Decision*, 6 FCC Rcd 5981 (Rev. Bd. 1991), filed by Sunshine Broadcasting, Inc. (Sunshine). Sunshine claims that the Board failed to address one of its exceptions and also made "an erroneous finding" pertaining to diversification of media interests. Sunshine's petition is opposed by the prevailing applicant, Hartsville Broadcasting Co., Inc. (HBC).

2. It will be recalled that Sunshine was disqualified in our *Decision* because (1) it was not financially qualified at the time it filed its application, and (2) was not currently financially qualified. Further, after a full comparative analysis, the Board determined that even if qualified, Sunshine could not prevail over HBC on a comparative basis, *see* 6 FCC Rcd at 5982-5983, and the proceeding would otherwise require a remand with a transmitter site suitability issue specified against Sunshine. *Id.*, at 5983.

3. Petitions for reconsideration will not be entertained where an applicant has presented no new facts or changed cirumstances as required by 47 CFR § 1.106(b)(2), nor will reconsideration be granted for the purpose of reviewing matters that have been considered. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1985). *See WWOR - TV, Inc.*, 5 FCC Rcd 7656 (1990); *Royce International Broadcasting*, 6 FCC Rcd 2601 (1991). Nevertheless, although the matter raised here was considered as not decisionally significant, we will address Sunshine's resurrected argument.

4. Sunshine claims, again, that HBC "should be disqualified for presenting an inchoate ownership interest." Petition at p. 1. Sunshine alleges that two HBC minority shareholders (Betty Wiggins, 16.7% ownership interest), and her husband (J. L. Wiggins, 19.5% ownership interest), "made commitments to divest their interests in HBC to an unknown person or persons should HBC's Hartsville application be granted." *Id.*, at p. 2.

5. In opposition, HBC points out that the Presiding Officer had already considered these arguments in the hearing proceeding below, and that (Opposition at p. 2):

> Betty and J.L. Wiggins, together holding 36% of HBC's stock, own 100% of a twice-weekly newspaper, *The Hartsville Messenger* ("*The Messenger* "). In its March 12, 1990 Integration Statement HBC pledged that "all ties with *The Messenger* would be severed" so that no principal of HBC would also be a principal of *The Messenger*. Thus, HBC promised there would be no overlapping ownership or interest between the Hartsville station and the newspaper. HBC did not specify whether that split would result from the Wigginses' divestiture of their HBC stock or their stock in the newspaper, thereby allowing them the flexibility to decide just how to effectuate the pledge. Thus, Sunshine's statement that the Wigginses "made commitments to divest their interests in HBC to an unknown person or persons" is false. However, as of their May 1990 depositions, the Wigginses' intent was to effectuate their pledges by divesting their stock in HBC rather than the newspaper. In fact, shortly thereafter, J.L. Wiggins did transfer his HBC stock to his adult son and resign his position as a director of HBC. That fact was timely reported to the Commission. *See Order*, FCC 90M-1665 (released June 14, 1990).

And, as HBC further explains: "Actually, J.L. Wiggins had already transferred his 19.5% interest in HBC to his adult son, but since that transfer occurred after the "B" cut-off date, HBC is attributed with his interest." *Id.*, at n. 2.

6. Noting that Sunshine had previously raised this matter only two days before commencement of the hearing,[1] HBC recounts that Sunshine's Motion (*id.*, at pps. 2-3):

> to the ALJ to dismiss HBC's application on the basis that the Wigginses' divestiture pledge renders the identity of some of HBC's voting stockholders unknown. The ALJ properly rejected that argument outright. *See Memorandum Opinion and Order*, FCC 90M-3234 (released October 15, 1990). There is no Commission requirement that Mrs. Wiggins obtain prior Commission approval before disposing of her 16.7% stock interest in HBC. The only regulatory requirement (outside of filing a Section 1.65 amendment if HBC's FM application is still pending) would be for HBC to report the change in its annual ownership report, a fact the ALJ recognized in denying Sunshine's motion. *Id.*, ¶ 3.

7. In support of its contentions, Sunshine again (as it did before the ALJ) relies upon *Azalea Corp.*, 47 FCC 2d 151 (Rev. Bd. 1973) (subsequent history omitted) (Section 1.65 "reporting issue" specifically added; applicant failed to produce any evidence thereunder; application denied).[2] Additionally, although Sunshine did not previously raise, nor rely upon, the Board's order in *Palmetto Communications Co.*, 6 FCC Rcd 2193 (Rev. Bd. 1991) (released some two months prior to the time Sunshine filed its exceptions here), it now attempts to further bolster its position,

claiming that, as in *Palmetto*, "no one knows who will own a significant portion of the voting stock of HBC when its station goes on the air." Petition at p. 3. However, like *Azalea*, *Palmetto* does not support Sunshine's position. In *Palmetto*, Robert Rickenbacker, one of two "50%/50%" general partners of a licensee seeking modification of its existing station facility, disclaimed *any* ownership interest in the applicant. The other 50% general partner claimed Rickenbacker *did* have such an interest. Since the ownership of the applicant was disputed by both partners, we held that we would not award the construction permit "to whom it may concern" and remanded the case for a hearing on (1) whether the applicant lacked candor and/or misrepresented facts regarding its ownership structure and (2) whether it had violated 47 CFR § 1.65 by failing to report the ownership dispute.

8. Unlike *Palmetto*, there is no raging dispute here over the true composition of the applicant or a potential misrepresentation issue. Fully reported was the prior transfer of J. L. Wiggins' 19.5% interest to his son. *See Order*, FCC 90M-1665, released June 14, 1990. Even should Betty Wiggins transfer her 16.7% interest, no adverse consequences are triggered under Commission rules, since an applicant may transfer up to 50% of its ownership after filing without forfeiting its position. 47 CFR § 73.3571(j)(2); *see also Sound Broadcasting Co.*, 6 FCC Rcd 3627 (Rev. Bd. 1991). Indeed, not only has HBC *not* been aided by these actual (or potential) ownership changes, it has received no integration credit for the ownership share of the Wiggins' and it has been charged with a diversification demerit for their other media interests, notwithstanding the actual (or potential) ownership changes in HBC. No prejudice has befallen Sunshine,[1] and no occasion arises for any issue, reporting or otherwise.

9. Sunshine next claims that it "should be declared the comparative winner" here, because (Petition at pps. 3-4; emphases added):

> Reconsideration is also requested on the basis that *the Board's reduction* of the effect of *The Messenger* on the diversification analysis because its owners are not to be integrated into the radio station operation is contrary to Commission policy. The Board cited no precedent for such holding. As Sunshine pointed out in its exceptions, it is solely ownership which determines the diversification assessment. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), makes it clear that diversification and integration are separate criteria; diversification is based strictly upon ownership, not whether that ownership will be integrated into operation of the station. To the degree that the Board's diversification analysis and comparative conclusions *were based on this misstatement of policy*, reconsideration should be granted . . . .

10. In our *Decision*, 6 FCC Rcd at 5983, we noted that the ALJ assessed a "very slight diversification demerit" for the ownership interests of Mr. and Mrs. Wiggins. Thereafter, we merely posited that "even if we were to, at best, slightly *increase HBC's* diversification demerit and modestly *decrease* the same demerit awarded *Sunshine*, HBC, on balance, would still clearly prevail on the all-important diversification factor." *Id.*, at para. 15. Sunshine's argument in this regard is without merit.

11. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Sunshine Broadcasting, Inc., on November 22, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] HBC observes that "Sunshine's motion was not filed until two business days before the hearing, although the facts upon which it was based were known to Sunshine three-and-a-half months earlier. Sunshine's only explanation for its gross lack of diligence was that it previously had not been aware of the principle allegedly enunciated in the 15-year-old *Azalea* [*Corp.*, 47 FCC 2d 151 (Rev. Bd. 1973)] decision upon which it premised its argument." Opposition at n. 3.

[2] In *Azalea*, when a 20.83% stockholder of Azalea Corporation, Dr. Francis England, died, Azalea failed to amend its application to report either England's death or the disposition of his stock. Thus, a 47 CFR § 1.65 "reporting issue" was specifically added against Azalea. At the remand hearing, Azalea did not introduce *any* evidence on the issue. The ALJ concluded that its failure to introduce evidence regarding the disposition of Dr. England's stock constituted a failure to carry its burden of proof under the specified issue, disqualified Azalea, and the Board affirmed. Thus, *Azalea* is inapposite here. Indeed, no "Section 1.65" issue has ever been sought by Sunshine, nor was such an issue specified against HBC, and there has been no failure of proof warranting its disqualification. Sunshine argues that the absence of a "reporting issue" is "not material," maintaining Azalea was "dismissed" because the identity of the owner of Dr. England's stock was unknown, and that if the case had been resolved on the basis of the reporting issue, Azalea's application would have been "denied." However, as HBC notes, "Sunshine does not cite the language allegedly 'dismissing' the Azalea application, and, in actuality, Azalea's application was *denied*. *See Azalea*, 47 FCC 2d at 160 (¶¶ 12 and 15). That denial resulted from Azalea's failure to meet its burden of proof under the Section 1.65 issue, leading to its disqualification. *Id.* at 152, 154." Opposition at p. 4.

> And, as HBC observes (*id.*, at pps. 4-5):
>
> Moreover, *Azalea* did not involve a divestiture pledge but actual present ownership of a stock interest. In *Azalea*, Dr. England's stock interest had transferred upon his death, whereas here Mrs. Wiggins' intent to sell her stock is contingent not only on grant of HBC's FM application but also upon her continued ownership of stock in *The Messenger*. In other words, if Mrs. Wiggins and her husband were, for some reason, to sell *The Messenger* before HBC's FM station went on the air, she might very well retain her stock in HBC. Thus, as the ALJ stated in denying Sunshine's motion to dismiss, "even a cursory reading of *Azalea* makes clear that the facts in *Azalea* bear not even the slightest relationship to the facts in the instant case." *Memorandum Opinion and Order*, FCC 90M-3234 at ¶ 3.

[3] Should any HBC stock be transferred, *e.g.*, to a party holding other media interests, even after the award of the permit, this would constitute a change in "core circumstances" requiring a reevalution of the comparative analysis, *were* Sunshine to be reinstated. *Crosthwait* v. FCC, 584 F.2d 550 (D.C. Cir. 1978); *W.S. Butterfield Theatres v. FCC*, 231 F.2d 552 (D.C. Cir. 1956); *Enterprise Co. v. FCC*, 231 F.2d 708 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 920 (1956).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-2

In re Applications of

DRY PRONG EDUCATIONAL BROADCASTING FOUNDATION (hereafter "Dry Prong Educational") — File No. BPED-900305MF

For Modification of
Noncommercial Station KVDP(FM),
Dry Prong, Louisiana

MISSIONARY ACTION PROJECTS (hereafter "Missionary Action") — File No. BPED-900905MK

For Construction Permit for
a New Noncommercial FM Station
on Channel 210 in
Alexandria, Louisiana

HEARING DESIGNATION ORDER

Adopted: January 6, 1992; Released: January 21, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications. One application is to modify the facilities of Station KVDP(FM), Dry Prong, Louisiana, and the other is for a new noncommercial FM Station in Alexandria, Louisiana.

2. On November 19, 1990, Alexandria Broadcasting Company, licensee of KALB(AM) and KZMZ(FM), Alexandria ("KZMZ"), filed a petition to deny the application of Missionary Action. Essentially, the petition charges that (1) Missionary Action has not demonstrated the necessary qualifications to be a noncommercial educational FM licensee; (2) the ownership interest of one of Missionary Action's three principals in the licensee of commercial station KWDF(AM), Ball, Louisiana, raises questions as to whether Missionary Action's proposed station will serve the commercial interests of Station KWDF; and (3) Missionary Action is not accredited and although not dispositive, when taken with the facts presented in the petition, Missionary Action should be disqualified.

3. Missionary Action's opposition, filed on December 21, 1990, challenges KZMZ's standing to file its petition arguing that there will be no competition between the two stations since Missionary Action proposes noncommercial service only. Missionary Action states that KZMZ's petition does not contain specific allegations of fact to show that a grant of Missionary Action's application would be *prima facie* inconsistent with the public interest and the allegations are not supported by any affidavits of persons with personal knowledge. In response to the allegations, Missionary Action contends that it is an established nonprofit corporation, and that its application indicates educational goals and proposes an educational program. Missionary Action points out that its application also discloses the 20% partnership interest which William D. Franks, president of Missionary Action, has in Station KWDF. In a signed declaration (Exhibit 1 of opposition), Mr. Franks asserts that there will be no impermissible cross promotion between the stations.[1]

4. In light of the action taken herein, the petition to deny will be granted to the extent indicated and denied in all other respects. As to the issue of standing, KZMZ has alleged that a grant of Missionary Action's application will cause economic injury by creating an additional competitor in its market. Since the question of standing does not depend upon the merits of the petitioner's contentions, assuming that the alleged facts set forth are true, KZMZ has established standing as a party in interest under 47 U.S.C. § 309(d). *See FCC v. Sanders Brother Radio Station*, 309 U.S. 470 (1940); *Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 94 (1980).

5. *Eligibility*. Section 73.503(a) of the Commission's Rules, 47 C.F.R. § 73.503(a), mandates that a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization upon a showing that the station will be used in the advancement of an educational program. Missionary Action states that as an educational purpose it "will seek to develop relationships with schools, educational institutions and other traditionally, educationally oriented charitable and public service organizations," and that it "will utilize the facilities of the station to support the educational programs of the community" by broadcasting particular programming and by using the station for training students in the area of broadcasting (Exhibit 1 of application). We find the material submitted in the application insufficient to make a determination that Missionary Action has an acceptable educational purpose in compliance with 47 C.F.R. § 73.503. Further, in a declaration attached to its opposition, Mr. Franks states that Missionary Action has "as its desire and objective to provide and distribute programs and to train people in the field of broadcasting," and that Missionary Action "will, through this broadcast medium, seek to help resolve community problems and issues." This showing still falls short of an acceptable educational purpose. Proposing to train people in the field of broadcasting is insufficient to make a determination that an applicant has an acceptable educa-

[1] On January 8, 1991, KZMZ filed a reply to the opposition which essentially restates its arguments from the original petition.

tional purpose. *Way of the Cross of Utah, Inc.*, 58 RR 2d 455, 460 n. 10 (1985). Accordingly, an appropriate issue will be specified.

6. KZMZ's allegation regarding Missionary Action's relationship with commercial Station KWDF is unsupported. Missionary Action's application states that it is a nonprofit corporation and that Mr. Franks has a 20% partnership interest in Station KWDF. Mr. Franks subsequently declared that there will be no cross promotion between the stations. Finding no further evidence to support KZMZ's claim, we deny this portion of the petition. For the same reason, we reject KZMZ's argument that since Missionary Action is not an accredited educational organization, it should not be awarded a construction permit. Section 73.503(a) does not require that an educational applicant be accredited by a state, regional, or national authority. Accreditation is merely one of the factors to be considered in determining the eligibility of an educational organization. *See* 47 C.F.R. § 73.503(a)(1); *Lower Cape Communications, Inc.*, 47 RR 2d 1577, 1578 (1980).

7. *Environmental.* Dry Prong Educational proposes to locate its transmitting antenna on a new tower and Missionary Action proposes an existing tower. Our engineering study indicates that both applicants have failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that they may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposal would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Dry Prong Educational and Missionary Action failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Dry Prong Educational and Missionary Action will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

8. *Share-time Agreement.* Dry Prong Educational has stated that attempts to remove the mutual exclusivity have been unsuccessful. However, neither applicant has indicated whether an attempt has been made to negotiate a sharetime arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing from participating in negotiations with a view toward establishing a share-time agreement among themselves.

9. *Section 307(b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will be specified.

10. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Missionary Action is qualified to be a noncommercial educational FM licensee.

2. If a final environmental impact statement is issued with respect to Dry Prong Educational and Missionary Action in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petition to deny filed by KZMZ is hereby granted to the extent set forth above.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Dry Prong Educational and Missionary Action shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be adressed to the named counsel of record, Hearing Branch, Enforcement Division, Mss Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

CONTINENTAL	CSR-3341
CABLEVISION OF	CSR-3348
OHIO, INC.	

Petitions for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1992; Released: January 17, 1992

By the Commission:

1. On December 27, 1989 and on December 29, 1989, Continental Cablevision of Ohio, Inc. (hereinafter "Continental"), operator of cable television systems serving several communities in northern Ohio, filed petitions for special relief seeking waivers of the Commission's network program nonduplication and syndicated exclusivity rules, §§76.92 -- 76.163 of the Commission's Rules.[1] Continental's petitions are unopposed.

2. The Commission's program exclusivity rules protect the holders of network non-duplication rights (§§76.92-76.97 of the Commission's Rules) and syndicated exclusivity rights (§§76.151-76.163 of the Commission's Rules) in given television market zones. Upon proper notification by a holder of such rights, a cable system in the particular market shall not carry protected programs as broadcast by any other television signal, with certain designated exceptions (*e.g.*, significantly viewed signals are exempt from program exclusivity blackouts, and systems serving fewer than 1000 subscribers are exempt from these rules.

3. Continental states, with respect to its petition concerning Tiffin and Fostoria, Ohio and neighboring communities (CSR-3341), that it has received a request for programming protection from Television Broadcast Station WUPW (Ind., Channel 36), Toledo, Ohio.[2] With respect to Continental's petition concerning Bellevue, Ohio and neighboring communities (CSR-3348), petitioner states that it has received similar programming protection requests from Stations WJKW-TV (CBS, Channel 8) and WEWS (ABC, Channel 5), both Cleveland, Ohio and WUAB (Ind., Channel 43), Lorain, Ohio.[3] In each case, states Continental, the stations requesting protection are entitled to enforce their rights only with respect to small portions of Continental's systems. However, due to the technical integration of the systems, Continental states that it cannot reasonably provide protection only in those portions of the systems in which protection is mandated. Accordingly, Continental seeks waivers of the rules.

4. In support of each of its petitions, Continental argues the sole communities in which protection is required by the rules have fewer than 1000 subscribers, and constitute four percent or less of the respective integrated systems' subscribers.[4] Any potential harm to the local broadcasters arising from a waiver, claims Continental, therefore would be insignificant and *de minimis*. This justifies waiver pursuant to long-standing Commission precedent, Continental argues, citing, *inter alia*, *Communicable of Texas*, 45 RR 2d 297 (1979); *Missouri Valley Communications, Inc.*, 58 FCC 2d 1101 (1976); *Cable Video, Inc.*, 35 RR 2d 981 (1975); and *Sabre Cablevision Co., Inc.*, 52 FCC 2d 328 (1975). Continental also asserts that waivers are warranted due to technical infeasibility. In each case, Continental avers that it could construct new headends -- one for its Tiffin-Fostoria system and two for its Bellevue system -- at a cost of approximately $155,000 per headend, to enable Continental to limit its blackouts to the required communities. However, by so doing, argues Continental, each new headend would be exempt from blackout requirements as serving fewer than 1000 subscribers. In such circumstances, contends Continental, requiring the estimated expenditures "would not be a socially useful exercise." Balancing the anticipated minimal impact to the local stations, the technical infeasibility of limiting the blackout range through Continental's systems, and the financial burden to Continental, petitioner claims that Commission precedent warrants waiver, citing, *e.g.*, *First Report and Order in Docket No. 20561*, 63 FCC 2d 956, 967 (1977), *recon. denied*, 67 FCC 2d 716 (1978), and *Hoosier Hills Cable Co.*, 48 FCC 2d 138 (1974), *recon. granted in part*, 51 FCC 2d 1137 (1975).

5. Following Commission staff inquiries, Continental submitted supplemental pleadings. In addition to summarizing and reiterating its earlier arguments, Continental also noted that each of its cable systems is a mature system, that penetration rates in the affected communities have remained stable over the past five years (ranging from 68% to 82% in the affected communities in 1986 to between 71% and 87% in the same communities today), and that total subscribership "is not expected to increase significantly in the near term." While future technology might allow more discrete blackouts than are currently possible, states Continental, prototype costs for the subscribers involved would still be over $100,000, which is not economically feasible.[5] Accordingly, contends Continental, literal application of the rules will not lead to long-term diversity.[6]

6. In adopting our current program exclusivity rules, we stated our intention that "a broadcaster cannot contract for exclusive rights when it has no reasonable expectation of exclusivity in any case." *Report and Order in Gen. Docket No. 87-24*, 3 FCC Rcd 5299, 5315 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). We further noted that "cable systems may continue to avail themselves of the standard waiver procedures provided in the Communications Act." *Gen. Docket No. 87-24*, 3 FCC Rcd at 5339 n. 243. Rules of general application, of course, cannot anticipate every situation that may arise. Consequently, the associated special relief process exists as a safety valve, to ensure that the rules are allowed to operate in accordance with their intended purposes. The question arises, therefore, in view of the information presented to us by Continental, whether special relief from our rules is warranted in the circumstances presented here.

7. We believe that waivers are warranted in the present circumstances. Continental has demonstrated that its system is configured and technically integrated in such a manner that the costs of segregating the relatively few affected subscribers is so prohibitive as not to be in the

public interest. We note that the affected communities are small, being served by a mature cable system whose penetration rates have remained relatively stable for several years, and that their subscribership is not expected to increase significantly in the near future. Indeed, only 486 of Continental's subscribers on its Tiffin-Fostoria system (only 3.89% of the system's subscribers), and only 145 of Continental's subscribers on its Bellevue system (only 2.45% of the system's subscribers) are within the market zones in question so as to render them liable to exclusivity blackouts on Continental's technically-integrated systems in the present circumstances. Such figures are clearly *de minimis* under our precedents. *See, e.g., Communicable, Inc., supra*; *Missouri Valley Communications, Inc., supra*; *Cable Video, Inc., supra*; *Sabre Cablevision Co., Inc., supra*. As in those cases, we look at the totality of the circumstances involved. While our program exclusivity rules are designed to protect parties' legitimate contractual rights so that "the supply and diversity of programming demanded by viewers" may be increased, *Gen. Docket No. 87-24*, 3 FCC Rcd at 5310, failure to waive our rules in a *de minimis* case such as this would provide protection with respect to only a few hundred viewers at the expense of thousands not barred from receiving the programming in question. However, in taking this action we are acutely aware that contractual rights are being abrogated.[7] Therefore, the burden of proof for like waivers will be high. This is to ensure that such waivers do not interfere with the policies underlying the Commission's exclusivity rules. In this regard, we note that we will not be bound to any fixed percentages of subscribers affected. We will look not only to the percentage of subscribers involved but also the absolute number of subscribers affected as one factor in our deliberations. In view of the reasons noted above, however, here the public interest would be served by granting the requested waivers.

8. In view of the foregoing, we find that grant of Continental's petitions is in the public interest.

9. Accordingly, IT IS ORDERED, That the petitions for special relief (CSR-3341, -3348) filed, respectively, December 27, 1989, and December 29, 1989, by Continental Cablevision of Ohio, Inc. ARE GRANTED.

10. IT IS FURTHER ORDERED, That the petitions for stay filed concurrently by Continental Cablevision of Ohio, Inc., with its special relief petitions ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Simultaneously with its petitions, Continental also filed petitions for stay of the rules in question. In view of our disposition today, we are dismissing these petitions as moot.

[2] Station WNWO-TV (ABC, Channel 24), Toledo, Ohio, had also requested protection from Continental. However, on January 26, 1990, WNWO-TV withdrew its request, while reserving its right to renew its request in the future should the affected community units reach a subscriber level of 1000.

[3] Stations WKYC-TV (NBC, Channel 3), Cleveland, Ohio, and WTVG (NBC, Channel 13), Toledo, Ohio, had also requested protection from Continental. However, on January 26, 1990, WKYC-TV and WTVG withdrew their requests, while reserving the right to renew their requests in the future should the affected community units reach a subscriber level of 1000.

[4] In CSR-3341, Continental notes that WKBD-TV (Ind., Channel 50), Detroit, Michigan, against which WUPW seeks protection, is significantly viewed in Wood County, but not in Sandusky, Hancock, and Seneca Counties. Thus, Continental need only black out WKBD-TV's programming to 486 of approximately 12,500 subscribers. In CSR-3348, Continental notes that 5766 of its 5911 subscribers are in communities which lie outside of the Toledo, Ohio and Cleveland, Ohio major television markets, and that, therefore, Continental need only black out the programming in question to 145 subscribers.

[5] While declining to disclose any specific financial data, Continental states that it generates less than $26.36 per household per month in the Fostoria system, the average revenue per household figure cited in the GAO *Follow-Up National Survey of Cable Television Rates and Services* (June 1990).

[6] Continental also raises several constitutional claims, asserting first amendment, equal protection, and copyright issues. In view of our disposition herein, we need not address these claims.

[7] In that regard, we note that the stations whose rights are directly implicated have not contested Continental's waiver request.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-3

In the Matter of

Amendment of Section 73.202(b), RM-7874
Table of Allotments,
FM Broadcast Stations.
(Prineville, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 8, 1992; Released: January 21, 1992

Comment Date: March 9, 1992
Reply Comment Date: March 24, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Danjon, Inc. ("petitioner"), requesting the allotment of Channel 284A to Prineville, Oregon, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 284A to Prineville, Oregon, since it could provide the community with its first local FM service. Channel 284A can be allotted to Prineville in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) southeast to avoid short-spacings to Station KMCQ, Channel 283C, The Dalles, Oregon, and Station KLCX, Channel 284C, Florence, Oregon.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Prineville, Oregon	--	284A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 9, 1992,** and reply comments on or before **March 24, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shelton M. Binstock, Esq.
1140 Connecticut Avenue, N.W., Suite 703
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 284A at Prineville are North Latitude 44-15-20 and West Longitude 120-42-26.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-4

In the Matter of

Amendment of Section 73.202(b), RM-7880
Table of Allotments,
FM Broadcast Stations.
(Greenacres, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 8, 1992; Released: January 21, 1992

Comment Date: March 9, 1992
Reply Comment Date: March 24, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Double D Broadcasting Company ("petitioner"), licensee of Station KRAB(FM), Channel 292A, Greenacres, California, seeking the substitution of Channel 291B1 for Channel 292A and modification of its license to specify operation on the higher class channel. Petitioner stated its intention to apply for Channel 291B1 if allotted to Greenacres.

2. A staff engineering analysis reveals that the site specified by petitioner would place the transmitter for Channel 291B1 a distance of 35.6 kilometers (22.1 miles) east of the community.[1]

3. We believe the public interest would be served by proposing the substitution of Channel 291B1 for Channel 292A at Greenacres, California, since it could provide the community with an expanded coverage area FM service. As requested, we shall also propose to modify the petitioner's license for Station KRAB(FM) to specify operation on Channel 291B1 in lieu of Channel 292A. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 291B1 at Greenacres, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Greenacres, California	292A	291B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 9, 1992,** and reply comments on or before **March 24, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Howard M. Liberman, Esq.
Peter H. Doyle, Esq.
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] Coordinates at the petitioner's specified site for Channel 291B1 are 35-29-02 and 118-44-12. Although the petitioner's designated site is located farther from Greenacres than the maximum distance (23.2 kilometers (14.3 miles)) the Commission normally assumes for the provision of city-grade coverage (3.16 mv/m), petitioner's engineering data demonstrates, and our engineering analysis confirms, that its proposal could comply with §73.315 of the Commission's Rules. In this regard, petitioner has shown that from its designated site, using maximum Class B1 facilities (*i.e.*, 25 kW at 100 meters HAAT), an unobstructed 70 dBu signal, computed in accordance with the Commission's standard prediction methods (§73.313(d)(1)-(3)) would extend 48.8 kilometers (30.2 miles) on a bearing of 251.8°. Thus, the 3.16 mV/m contour should encompass the entire community. *See Woodstock and Broadway, VA,* 3 FCC Rcd 6398 (1988).

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-5

In the Matter of

Amendment of Section 73.202(b), RM-7878
Table of Allotments,
FM Broadcast Stations.
(Oak Creek, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 8, 1992; Released: January 21, 1992

Comment Date: March 9, 1992
Reply Comment Date: March 24, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of KFMU, L.P. ("petitioner"), licensee of Channel 280A, Oak Creek, Colorado, seeking the substitution of Channel 281C3 for Channel 280A and modification of its license accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 281C3 if it is allotted to Oak Creek, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 281C3 for Channel 280A at Oak Creek, Colorado, since it could provide an enhanced service to the community. Channel 281C3 can be allotted to Oak Creek at the petitioner's specified site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. We shall propose to modify the license for Station KFMU(FM), as requested. Since the modification request complies with the provisions of Section 1.420(g) of the Commission's Rules, we will not entertain competing expressions of interest in the use of Channel 281C3 at Oak Creek, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. Accordingly, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Oak Creek, Colorado	280A	281C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 9, 1992,** and reply comments on or before **March 24, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William D. Freedman, Esq.
Gurman, Kurtis, Blask &
Freedman, Chartered
1400 - 16th Street, N.W.
Suite 500
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for Channel 281C3 are 40-15-20 and 106-57-21.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-440

In the Matter of

Amendment of Section 73.202(b), RM-6763
Table of Allotments,
FM Broadcast Stations.
(Texarkana, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1992; Released: January 21, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7137 (1989), issued in response to a petition for rule making filed by State Line County Broadcasting Company, permittee for Station KUKB, Channel 292A, Texarkana, Arkansas, proposing the substitution of Channel 292C2 for Channel 292A, and modification of its permit to specify operation on the higher class channel.

2. Petitioner filed comments reaffirming its interest in applying for the channel, if allotted. CarePhil Communications ("CarePhil"), licensee of Station KKBI(FM), Channel 291C2, Broken Bow, Oklahoma, filed comments opposing the proposed substitution on the grounds that the Texarkana proposal would be short spaced to both the licensed KKBI(FM) facility and to CarePhil's application to downgrade its station to a Class C3 facility.[1] Petitioner filed a Motion to Dismiss and CarePhil filed an Opposition. CarePhil subsequently withdrew its opposition, stating that both parties have been able to reach a compromise so that improvements in both facilities are possible.[2] Accordingly, petitioner's proposal is uncontested.

3. We believe the public interest would be served by the substitution of Channel 292C2 for Channel 292A at Texarkana, since it could enable Station KUKB to increase its service area. Channel 292C2 can be allotted to Texarkana in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 16.5 kilometers (10.3 miles) southeast at petitioner's requested site.[3] Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the permit of State Line Broadcasting for Station KUKB to specify operation on Channel 292C2 in lieu of Channel 292A at Texarkana, Arkansas.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 2, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Texarkana, Arkansas	292C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of State Line County Broadcasting for Station KUKB, Texarkana, Arkansas, IS MODIFIED to specify operation on Channel 292C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

CarePhil Communications
617 South Park Drive
Broken Bow, Oklahoma 74728
(BPH-890717IK)

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 632-6302.

---

[1] Contrary to CarePhil's arguments, the proposed substitution at Texarkana is not short spaced to KKBI's presently authorized facilities. KKBI was originally licensed to operate on Channel 292A, and subsequently upgraded to Channel 291C2. An application is pending to downgrade KKBI from a Class C2 to a Class C3 station (BPH-890717IK). Petitioner's proposal is short spaced to this application and cannot be further site restricted to avoid this conflict. However, the site specified in KKBI's application is generally considered a mere site preference unless KKBI can make a showing to the contrary. *See Andalusia, Alabama*, MM Docket No. 83-999, 49 FR 32201 (August 13, 1984). CarePhil will be served with a copy of this *Order* and will be permitted to amend its application to specify a non-conflicting site.

[2] State Line and CarePhil also filed a settlement agreement to resolve the conflict. However, we make no judgment as to the merits of the settlement agreement.

[3] The coordinates for Channel 292C2 at Texarkana are North Latitude 33-18-05 and West Longitude 93-57-10.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-6

In re Applications of

NORMANDY BROADCASTING CORP. File No. BRH-910129UR

For Renewal of License of
Station WYLR(FM) (95.9 MHz),
Glens Falls, New York

and

LAWRENCE N. BRANDT File No. BPH-910430MB

For a Construction Permit for
a New FM Station on 95.9 MHz
at Glens Falls, New York

HEARING DESIGNATION ORDER

Adopted: January 7, 1992; Released: January 21, 1992

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of Normandy Broadcasting Corp. ("Normandy") for renewal of license of Station WYLR(FM), Glens Falls, New York; and (b) the application of Lawrence N. Brandt ("Brandt") for a construction permit for a new FM broadcast station at Glens Falls, New York. The applications are mutually exclusive because Brandt proposes to operate on 95.9 MHz, the frequency on which WYLR(FM) presently operates.

2. Normandy is an applicant for a construction permit for a new FM station on Channel 289B1 at Queensbury, New York. *See* MM Docket No. 90-181. In his *Initial Decision*, 6 FCC Rcd 2221 (ALJ 1991), the Presiding Judge ultimately concluded, *inter alia*, that "Normandy is disqualified to operate the proposed Queensbury facility because it has not established that it can be relied upon to provide truthful information to the Commission." 6 FCC Rcd at 2232. This conclusion was based, in part, on representations that Normandy had made in the Queensbury proceeding about its operation and programming of WYLR(FM), the station for which Normandy is seeking the renewal of license.

3. In *Barry Skidelsky*, FCC 91R-115 (released January 2, 1992), the Review Board also disqualified Normandy, albeit on the basis of Normandy's lack of reasonable assurance of the availability of a transmitter site.[1] The Review Board decision has not become final. However, if a final adjudication is rendered in which it is determined that Normandy lacks the requisite character qualifications to be a Commission licensee, such a determination would raise substantial and material questions about Normandy's basic qualifications to remain the licensee of WYLR(FM). Therefore a *contingent* issue will be specified herein against Normandy. In the event that Normandy's captioned application for renewal of license of WYLR(FM) is granted prior to the issuance of a final decision in the Queensbury proceeding, such grant shall be conditioned upon the outcome of the Queensbury case.

4. The Commission's Antenna Survey Branch has not received a final airspace determination from the Federal Aviation Administration ("FAA") with respect to Brandt's proposal. Consequently, an appropriate air hazard issue will be specified against Brandt, and the FAA will be made a party to this proceeding.

5. Except as indicated by the issues specified below, the applicants are qualified to construct and/or operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to § 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A COMPARATIVE PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine whether there is a reasonable possibility that the tower height and location proposed by Brandt would constitute a hazard to air navigation.

(b) If a final decision is rendered in the Queensbury, New York, proceeding (MM Docket No. 90-181) in which it is determined that Normandy lacks the basic qualifications to be a Commission permittee or licensee, to determine the effect(s) thereof on Normandy's basic qualifications to remain the licensee of Station WYLR(FM), Glens Falls, New York.

(c) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue.

[1] The Board stated that "[b]ecause Normandy is disqualified on the basic site issue, we need not go further to determine whether Normandy's conduct [in the Queensbury proceeding] amounted to misrepresentation." *Barry Skidelsky, supra*, FCC 91R-115 at § 35.

8. IT IS FURTHER ORDERED, That, for the reasons discussed in 2 and 3, above, in the event Normandy's application for renewal of license of WYLR(FM), Glens Falls, New York, is granted prior to the issuance of a final decision in the Queensbury, New York, proceeding (MM Docket No. 90-181), such grant SHALL BE CONDITIONED upon the outcome of that proceeding.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service SHALL BE ADDRESSED to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order also SHALL BE SERVED on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Normandy and Brandt, pursuant to § 1.221(c) of the Commission's Rules, in person or by their respective attorneys, within 20 days of the release of this Order, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That Normandy and Brandt, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice, as required by § 73.3549(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TETON COMMUNICATIONS INCORPORATED — File No. 25673-CD-P-M/L-90

For modification of facilities in the Public Land Mobile Service to East Butte, Idaho, for station KLF596

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1991; Released: January 21, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Teton Communications, Inc. (Teton) filed an application to relocate its 152.15 MHz Public Land Mobile Radio Service (PLMS) facility (station KLF596) to East Butte, Idaho.[1] Western Tele-Communications, Inc. (WTCI)[2] filed a petition to dismiss or deny Teton's application. Teton and WTCI filed responsive pleadings. For the reasons discussed below, we deny WTCI's petition and grant Teton's application.

II. DISCUSSION

2. WTCI contends that Teton's application should be dismissed or denied because its proposed 152.15 MHz facility "would cause [third order harmonic interference to the receiving capabilities of] WTCI's telephone maintenance station (call sign KZX473) operating on frequencies 451.450 MHz Tx and 456.450 MHz Rx" in East Butte, Idaho. *See* WTCI petition, affidavit of James H. Berg at 2. Alternatively, WTCI requests that the Commission grant Teton's application subject to the condition that Teton, prior to filing its FCC Form 489, "install harmonic filters and take other reasonable measures to avoid causing harmful interference to" WTCI's existing station. *See* WTCI petition at 4. Further, WTCI requests that the Commission issue Teton's application as a developmental authorization [3] which "automatically converts to a permanent license at the end of . . . sixty [days] . . . unless WTCI timely certifies to the Commission and its Field Operations Bureau that its Station KZX473 is receiving harmful interference from the [Teton] developmental station." *See* WTCI petition at 4. Teton argues that it has signed a site agreement with the Bureau of Land Management (BLM)[4] which fully protects WTCI from all potentially harmful interference from Teton's proposed facility.[5] In addition, Teton states that it has previously assured WTCI that it will install necessary filters to suppress the harmonic emissions from its proposed facility to protect WCTI's station. In response, WTCI asserts that the Commission, and not the BLM, has the statutory responsibility for ensuring that proposed facilities will not cause interference to licensed facilities.

3. Neither the Communications Act of 1934, as amended, (the Act) nor the Commission's rules requires applicants for authorizations in the PLMS to protect against causing third order harmonic interference to existing licensees. Commercially manufactured transmitting equipment, type accepted pursuant to Section 22.120 of the rules, will emit harmonics at levels sufficiently attenuated to avoid interference to nearby, properly designed receivers. In the event of interference between base stations which significantly interrupts or degrades service, the Commission expects the parties to resolve the problem themselves. Only if that effort fails may they seek Commission involvement. *See* 47 C.F.R. §22.100(b). There is no reasonable expectation of interference discernable from the Teton application before us. There is therfore no legal or technical foundation for WTCI's petition.[6] We also find that Teton's modification application complies fully with the Act and the rules.[7] Finally, we find that Teton is qualified to be a Commission licensee and that a grant of Teton's application would be in the public interest.

III. ORDERING PARAGRAPHS

4. Accordingly, IT IS ORDERED THAT the petition to dismiss or deny filed by Western Tele-Communications, Inc. IS DENIED.

5. IT IS FURTHER ORDERED THAT Teton Communications Incorporated's application for modification of facilities in the Public Land Mobile Service (File Number 25673-CD-P-M/L-90) is GRANTED.

6. This Order is issued under Section 0.291 of the rules and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Report No. PMS-900-40 at 5 and 6 (released July 5, 1990) (application accepted for filing); *see also* Public Notice, Report No. PMS-90-47 at 9 (released August 22, 1990) (correction to July 5, 1990 Public Notice). In its application, Teton also requests approval to relocate its 152.03 MHz PLMS facility (station KLF596) to Kinport Ridge. *Id.* Because we are granting Teton's application, we thereby grant Teton's request to relocate its 152.03 MHz PLMS facility.

[2] WTCI is the licensee of Station KZX473, a 450 MHz station at East Butte, Idaho. WTCI states that "Station KZX473 is licensed under Part 90 of the Commission's rules and is used for the regular and emergency maintenance of public communications facilities." *See* WTCI petition at 2.

[3] Section 22.400 of the rules provides that the Commission may issue developmental authorizations for up to one year "to communications common carriers for experimentation leading to the development of a service regulated by this part." *See also* 47 C.F.R. §22.404(a).

[4] The BLM manages the site where WTCI's existing facility is located and Teton proposes to build its facility. *See* WTCI petition, affidavit of James H. Berg at 2; *see also* Teton opposition at 1.

[5] Teton states that the BLM requires all parties seeking to use the land it manages to sign an agreement protecting existing radio operators from harmful interference created by additional users of the site. *See* Teton opposition at 1. Also, Teton states that to continue to operate at the site, it will be required to test its proposed facilities to demonstrate to BLM its protection of WTCI's facility. *See* Teton opposition at 2.

[6] If WTCI does experience interference, we expect it to resolve the problem with Teton.

[7] WTCI contends that Teton's application is incomplete because Teton stated that it is "interested in the ownership or control of . . . other licensed radio stations or pending applications for radio stations under Part 22 within 40 miles of the" proposed station, but failed to identify these stations as required by FCC Form 401. *See* Teton application, Schedule A, item 18. Teton submitted an attachment to its Form 401 identifying its relevant Part 22 interests. *See* Letter from Teton to the Commission, Attachment re: Item 18 (December 21, 1991). We find Teton's application as supplemented is complete and reject WTCI's contention.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Danny's Two Way Communications, Inc. File No. 21388-CD-P/ML-01-91

For facilities in the Public Land Mobile Service for frequency 152.69 MHz, at Finneytown, Ohio.

For station KNKL995

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1992; Released: January 21, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Danny's Two Way Communications, Inc. (Danny's) filed an application for frequency 152.69 MHz in Finneytown, Ohio in January 1991. On February 4, 1991, Ohio Bell Telephone Company (Ohio Bell) filed a Request for Conditional or, Alternatively, a Developmental Grant of the license to Danny's. Danny's filed a letter to which Ohio Bell responded. For the reasons set forth below, we grant Danny's application and deny Ohio Bell's request.

II. DISCUSSION

2. Ohio Bell is a co-channel licensee operating station KQA440 in Dayton, Ohio. In its pleading, Ohio Bell speculates that "[t]here is a reasonable possibility that interference from the proposed facility will impair the operation of Ohio Bell's facilities."[1] The engineering statement of John S. Papay which Ohio Bell attached to its pleading does not contain any specific engineering information which could call into question the engineering supplied by Danny's in its application.

3. Danny's responds that Ohio Bell is only speculating that there would be interference. Furthermore, Danny's explains that it plans to operate mounting its antenna as recommended by the manufacturer and that its engineering is consistent with the Carey report and that it provides interference protection as required by the Commission's rules.

4. We reject Ohio Bell's claim of harmful interference and request for a conditional or developmental grant. Allegations of harmful electrical interference must be substantiated by an engineering report. *See, Tadlock's Radio Dispatch*, 8 FCC 2d 197 (1967); *See also, Bobier Electronics, Inc.*, FCC No. 07229 (Com.Car.Bur., Feb. 23, 1981.) The petitioner has only offered speculative conclusions that there will be harmful interference. Ohio Bell has not offered any supporting engineering studies which would provide a sound factual basis for its claims. Danny's has provided a sufficient engineering showing demonstrating that it is in compliance with our application requirements to demonstrate that there will be no harmful co-channel interference. Accordingly, we conclude that Ohio Bell has not raised a substantial issue of harmful co-channel interference which would warrant a conditional or developmental grant.

III. ORDERING PARAGRAPHS

5. IT IS HEREBY ORDERED THAT the application filed by Danny's Two Way Communications, Inc. for 152.69 MHz at Finneytown, Ohio is GRANTED; and

6. IT IS FURTHER ORDERED THAT the Request for a Conditional, or in the Alternative, Developmental Grant filed by Ohio Bell Telephone Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Ohio Bell Request for Conditional or, Alternatively, a Developmental Grant, at 1 (filed Feb. 4, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Afton Communications Corporation — File No. 63500-92-4-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KNKC693 in the Public Land Mobile Service at Tazewell, VA.

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 13, 1992; Released: January 21, 1992

By the Chief, Mobile Services Division:

1. On September 18, 1990, the Commission granted an authorization to Afton Communications Corporation (Afton) to operate on frequency 158.10 MHz at Tazewell, VA. The expiration date of the authorization was September 18, 1991. On September 12, 1991, Afton completed construction of the facilities and commenced operations. On October 4, 1991, Afton filed FCC Form 489, Notification of Status of Facilities, to request reinstatement.

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Afton commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states, in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Afton's failure to file the required Form 489 until October 4, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for failing to file required forms is $30,000.00. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture by $15,000.00 because failing to file an FCC Form 489 is a relatively minor violation and by an additional $9,000.00 because Afton voluntarily disclosed its failure to file the FCC Form 489.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Afton Communications Corporation IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000.00) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Independent Telcos of St. Croix County For Minneapolis/St. Paul MSA General Partnership — File No. 01279-CL-MP-88

For authority to construct a cellular system in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, for St. Croix County in Market 15, Minneapolis/St. Paul MSA

Minneapolis SMSA Limited Partnership — File No. 01038-CL-MP-88

For authority to modify and add facilities and expand its Cellular Geographic Service Area for Station KNKA 219 in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market 15, Minneapolis/St. Paul MSA

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1992; Released: January 21, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Common Carrier Bureau are two Petitions for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership (Independent). The first contests the dismissal of Independent's captioned application by the Mobile Services Division (MSD).[1] The second seeks reconsideration of the MSD's grant of the captioned application of Minneapolis SMSA Limited Partnership (Minneapolis LP), the wireline licensee for the Minneapolis-St. Paul, Minnesota/Wisconsin MSA (Minneapolis MSA). For the reasons set forth below, we affirm the MSD's actions on the captioned applications.

II. BACKGROUND

2. On April 19, 1988, prior to the expiration of the five year "fill-in" period for the Minneapolis MSA, Minneapolis LP filed its "fill-in" application to expand its CGSA within the Minneapolis MSA.[2] On May 26, 1988, within sixty days of the public notice listing that application as acceptable for filing, Independent filed its application for a cellular system within the same part of the Minneapolis MSA proposed to be served by Minneapolis LP.[3] On August 9, 1988, the MSD dismissed Independent's application as defective pursuant to Section 22.31(a)(1)(i), because it was filed prior to the end of the "fill-in" period allowed for Minneapolis LP.[4] On September 19, 1988, Independent filed its first petition, contending that the dismissal was in error. Subsequently, on March 28, 1989, the MSD granted the Minneapolis LP application.[5] On April 25, 1989, Independent filed the second petition, requesting that the grant of Minneapolis LP's application be set aside pending action on the first petition, or, in the alternative, conditioned upon a final order of the Commission and judicial review of the dismissal of Independent's application. Both parties filed responsive pleadings.

3. For the top 30 MSAs, including the Minneapolis MSA, the Commission announced that applicants must file their initial cellular applications by a date certain, *viz.*, June 7, 1982. *Cellular Communications Systems*, 89 FCC 2d 58, 87-94, *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983). Neither Independent nor any of its individual wireline partners filed an initial MSA application by that date. The Commission reiterated this date certain filing policy in the *Cellular Lottery Rule Making*, 98 F.C.C. 2d 175, 203-04 & n.81 (1984), *aff'd*, *Cellular Radio Service (Lottery Selection)*, 58 Rad. Reg. 2d (P&F) 677, 688 (1985). However, pursuant to Sections 22.903(d) and 22.913(a) of the rules, cellular permittees or licensees were allowed to modify existing authorizations by filing to expand their initial CGSAs, but the Commission stated that it would not permit mutually exclusive applications to be filed against those "fill-in" applications during the initial nationwide licensing period. *Cellular Lottery Rule Making*, 98 F.C.C. 2d at 204 n.81.

4. Subsequently, the Commission dismissed as "untimely filed" a competing application that had been filed by La Star Cellular Telephone, Inc. (La Star) within the sixty day period provided by the Commission's cut-off rule, Section 22.31(b), against the "fill-in" application of the initial wireline licensee in the New Orleans MSA.[6] *See New Orleans CGSA, Inc.*, FCC 85-209 (released May 6, 1985). The Commission's dismissal of the La Star application was set aside on appeal. *Maxcell Telecom Plus, Inc. v. FCC (Maxcell)*, 815 F.2d 1551 (D.C. Cir. 1987). The court determined that the Commission's orders prior to the 1984 order in *Cellular Lottery Rule Making*, 98 F.C.C. 2d at 204 n.81, had not provided adequate notice to La Star that applications filed after June 7, 1982 in response to fill-in applications would be deemed "untimely filed." *Maxcell*, 815 F.2d at 1556-1559. The court ordered reinstatement of La Star's application *nunc pro tunc*. *Id.*

5. Pending the appeal by La Star, the Commission initiated a notice and comment Rule Making proceeding to determine whether it should allow non-licensees to file applications competing with licensees' fill-in applications. *See Further Notice of Proposed Rule Making*, 1 FCC Rcd 499 (1986) (NPRM). Subsequent to the ruling in *Maxcell*, the Commission adopted Section 22.31(a)(1)(i) of the rules, providing for a five year period protecting the "fill-in" applications of licensees from competing applications. *Second Report and Order, CC Docket No. 85-388*, 2 FCC Rcd 2306 (1987), *modified in part, Order on Reconsideration of Second Report and Order (Reconsideration of Second Report and Order)*, 4 FCC Rcd 5377 (1989), *petition for review pending, Amery Telephone Company, et. al. v. FCC*, No. 89-1524 (D.C. Cir., filed Sept. 1, 1989).

III. DISCUSSION

6. In its first petition, Independent argues that this case is like La Star's, because it, too, filed an application to compete with the "fill-in" application of an existing licensee. Independent asserts that the court in *Maxcell* found that because the Commission had not announced prior to the date certain for filing initial MSA applications its "fill-in" policy prohibiting competing applications, La Star did not receive sufficient notice that it might lose the ability to choose whether to file an initial MSA application prior to the date certain or a competing application later. *See Maxcell*, 815 F.2d at 1560. Independent says that it is in the same position as La Star, and that it did not receive sufficient notice either. It argues that the MSD's dismissal of its application is contrary to what it perceives as the *Maxcell* holding, that the date certain cut-off policy could not be applied to an applicant filing a competing application. Independent further contends that the Commission's adoption of the five year period in Section 22.31(a)(1)(i) in a Rule Making proceeding, *Second Report and Order*, 2 FCC Rcd 2306, did no more to give Independent meaningful notice of the choice it would have to make prior to the date certain for filing initial applications than did the 1984 *Cellular Lottery Rule Making*, 98 F.C.C. 2d at 204 n.81.

7. Minneapolis LP responds that Independent, unlike La Star, no longer had a basis to file its application, because Independent filed its competing application after Section 22.31(a) was amended. The *Maxcell* decision, argues Minneapolis LP, did not curtail the discretion that the Commission has to change its application filing rules and apply those rules prospectively. *Multi-State Communications, Inc. v. FCC, (Multi-State)* 728 F. 2d 1519 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984).

8. The Commission has already addressed contentions, such as those Independent makes, of insufficient notice of the change in filing procedures to parties that seek to file competing applications. *Reconsideration of Second Report and Order*, 4 FCC Rcd at 5378. The Commission stated that *Maxcell* held only that the Commission had not given adequate notice of the date certain for filing cut-off procedure and that an application could not be dismissed as untimely filed for failure to comply with that procedure. *Id.* The Commission rejected the argument that *Maxcell* requires it to accept applications that might be filed subsequent to the Rule Making proceeding to compete with an existing licensee's "fill-in" application. *Id.*

9. With regard to Independent, which filed its competing application subsequent to the Rule Making proceeding, the holding in *Maxcell* is inapposite. The court in *Maxcell* did not address the question of whether, through a notice and comment Rule Making proceeding, the Commission could adopt filing requirements that would render certain prospective applicants ineligible to apply. *See Reconsideration of Second Report and Order*, 4 FCC Rcd at 5378. The Commission's authority to take such action is well-established. *See Storer Broadcasting Co. v. FCC (Storer)*, 351 U.S. 192 (1956). Because Section 22.31(a)(1)(i) was adopted pursuant to a notice and comment Rule Making, there was explicit notice of the impact of the rule on potential MSA applicants. Thus, the rule could apply prospectively, even to applicants who had not filed an initial application in the top 90 MSAs and would be frustrated in their attempts to file competing applications against "fill-in" applications by existing licensees. *See Reconsideration of Second Report and Order*, 4 FCC Rcd at 5378, *citing Multi-State*, 728 F.2d 1519.[7] We find that Independent falls within this category. Independent had not filed an initial application for the Minneapolis MSA (*see supra*, para. 3) and only filed a competing application against the fill-in application for the Minneapolis MSA well after the effective date of Section 22.31(a)(1)(i).[8] Therefore, the MSD properly applied this rule in rejecting Independent's application.

10. In view of the foregoing, we need address only briefly Independent's second petition. Independent suggests that the grant of Minneapolis LP's application will prejudice the outcome of its first petition and subsequent review. Our determination herein rejecting reinstatement of Independent's application moots the second petition. See para. 2, supra.

IV. ORDERING CLAUSES

11. Accordingly, the Petition for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership of the dismissal of its application, File No. 01279-CL-MP-88, IS HEREBY DENIED and the DISMISSAL of the application by the Mobile Services Division IS AFFIRMED.

12. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership of the grant of the application of Minneapolis SMSA Limited Partnership, File No. 01038-CL-MP-88, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone,
Chief, Common Carrier Bureau

FOOTNOTES

[1] At the time the applications in this case were filed, Section 22.31 (a)(1)(i) provided that ". . . applications by other than licensees or permittees for a . . . Metropolitan Statistical Area (MSA) to serve unserved areas outside the presently authorized CGSA [Cellular Geographic Service Area] but within the MSA are prohibited from being filed and will not be considered as mutually exclusive with a licensee's or permittee's application filed under 22.903(d) herein until five years from the date of the first construction permit granted in that MSA." 47 C.F.R. § 22.31 (a)(1)(i).

[2] The Commission granted Minneapolis LP's initial wireline construction authorization on June 6, 1983. *See Advanced Mobile Phone Service, Inc. et al.*, Mimeo No. 4567 (Com.Car.Bur. 1983).

A "fill-in" application is an application filed by the initial licensee or grantee, after receiving initial construction authorization, to serve an area within the MSA but outside the authorized CGSA. This area is termed an "unserved area", as referred to in Section 22.31(a)(1)(i).

[3] *See* Public Notice, Mimeo 2775 (released April 29, 1988).

[4] The MSD initially granted Independent's application. *See* Public Notice, Mimeo 4059 (released August 8, 1988). The MSD found the grant in error and rescinded it. *See* Letter from Chief, MSD, to Robert M. Jackson, counsel for Independent (August 9, 1988).

[5] *See* Public Notice, Report No. CL-89-117 (released March 28, 1989).

[6] Pursuant to Section 22.31(b), the cut-off period for filing a conflicting application is sixty days after the date of public notice announcing the first-filed application as acceptable for filing, or one business day before final action by the Commission on the first application. *See* 47 C.F.R. §22.31(b).

[7] Moreover, the Commission fully explained the change in the eligibility criteria effectuated by the rule, as required by *Storer*, 351 U.S. at 205. *See Reconsideration of Second Report and Order*, 4 FCC Rcd at 5378-79. Further, Independent's contention that the dismissal of its application is inconsistent with *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) overlooks that the court in *Maxcell* noted that *Ashbacker* does not apply to prospective applicants. *See Maxcell*, 815 F.2d at 1561, *citing Reuters, Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986).

[8] Amended Section 22.31 has been applied as effective on June 5, 1987. *See Reconsideration of Second Report and Order*, 4 FCC Rcd at 5382 n.16.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DANNY'S TWO WAY COMMUNICATIONS, INC.
d/b/a DANN
COMM PAGING

File No. 24956-CD-P/01-90

For facilities in the Public Land Mobile Service at Middletown, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1992; Released: January 21, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Danny's Two Way Communications, Inc., d/b/a Dann Comm Paging (Danny's), has filed a Petition for Reconsideration requesting that the order of the Chief, Mobile Services Division's (MSD) in *Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging*, 6 FCC Rcd 3550 (1991) (*MSD Order*), which dismissed Danny's application, be overturned. USA Mobile Communications, Inc. II (USA Mobile) filed an opposition. For reasons set forth below, we deny Danny's petition.

II. BACKGROUND

2. Danny's filed an application to establish facilities on frequency 152.66 MHz at Middletown, Ohio. USA Mobile sought dismissal, claiming that it was already licensed for that frequency at Middletown. Danny's responded that USA Mobile's authorizations had expired by law under Section 22.303 of the Commission's rules[1] because the frequency at Cincinnati had been abandoned. USA Mobile replied that it previously notified the Commission that it had deleted its Cincinnati location but that it remained active at Middletown, West Chester, and Dayton. In its decision, the MSD noted that a license terminates only after the Commission takes formal action, and USA Mobile's authorization at Middletown had not been terminated. It concluded, therefore, that the frequency was not available for reassignment. The MSD dismissed Danny's application without prejudice but directed USA Mobile to provide additional information in response to Danny's allegations of abandonment.

3. In its petition for reconsideration, Danny's argues that nothing in Section 22.303 suggests that independent Commission action is necessary to terminate a license. Danny's asserts that in *Notice of Proposed Rule Making*, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990) (*NPRM*), the Commission construed virtually identical language of Section 90.157 of the Commission's rules (which involves Private Land Mobile Services) to effect an automatic license termination without a separate act by the Commission to cancel. Danny's thus asserts that the MSD's action is opposite of the Commission's conclusion in the *NPRM* that a "finder's preference" be adopted to provide incentives in helping to recover spectrum previously licensed but unused.

4. USA Mobile's opposition to Danny's petition contends that the "finder's preference" is merely a proposal under Commission consideration which has not yet been adopted and, furthermore, the "finder's preference" would apply only after the Commission completed any necessary inquiries and revoked or cancelled the existing license. In any event, USA Mobile further argues that the Common Carrier Bureau has not considered the *NPRM* and, moreover, it is inapplicable to this proceeding.

5. In reply, Danny's asserts that the Commission has definitely construed Section 90.157 in accordance with Danny's position, contrary to the *MSD Order*, and because Section 90.157 language is virtually identical to Section 22.303, the MSD is bound, regardless of its past practice. Danny's emphasizes that the Commission has determined that some sort of "finder's preference" is warranted in land mobile services and that only the specific mechanics are involved in the *NPRM*, not the concept of a "finder's preference."

III. DISCUSSION

6. Danny's raises two issues. The first is whether a PLMS permit is terminated only on release of a Commission Public Notice. The second is whether the policies set forth in the *NPRM* apply to DPLMS licenses. Section 22.303 does not provide that an authorization automatically expires upon abandonment of a station. Indeed, the rule requires that the licensee must forward the authorization to the Commission so that it can be cancelled. Therefore, until the Commission terminates the authorization, such as by issuance of a public notice, the authorization remains in effect and the frequency is unavailable to others. Danny's second argument regarding the *NPRM* fails on two grounds. First, the *NPRM* by its own terms applies to Part 90 licensees, not Part 22 licensees. Second, a notice of proposed rule making generally does not impose new procedural requirements, and does not operate to dispense with current practices founded on existing rules or policies.[2] For these reasons, we reject Danny's arguments and affirm the MSD's decision below.

IV. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 22.303 provides

> If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, any station which has not operated for 90 continuous days is considered to have been permanently discontinued, unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period and provided a date when operation will resume, which shall not be in excess of 30 additional days.

[2] As noted above, the MSD directed USA Mobile to provide additional information in view of Danny's allegations in the proceeding below. Whether or not the Commission finds that USA Mobile's use of the frequency 152.66 MHz was in compliance with the Commission's rules is not relevant to a determination of whether Danny's application was defective. If, as a result of the inquiry, the Commission takes some future action concerning USA Mobile's license, Danny's may have an opportunity to apply for that frequency in the future.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-338

In re Applications of

KENNELWOOD BROADCASTING COMPANY, INC.	File No. BPH-870629MU
EXCELSIOR COMMUNICATIONS, INC.	File No. BPH-870630NA
CHASE COMMUNICATIONS, INC.	File No. BPH-870630NB

For Construction Permit for a
New FM Station on Channel 233A,
Waco, Texas

ORDER

Adopted: January 2, 1992; Released: January 21, 1992

By the Commission:

1. Before the Commission are a Review Board Decision, *Kennelwood Broadcasting Company, Inc.*, 6 FCC Rcd 1350 (Rev. Bd. 1991), *reconsideration denied*, 6 FCC Rcd 2894 (Rev. Bd. 1991); Applications for Review filed June 27, 1991 by Excelsior Communications, Inc. and by Chase Communications, Inc.; Oppositions filed July 15, 1991 by Kennelwood Broadcasting, Inc. (KBC); a Supplement to Application for Review filed December 4, 1991 by Chase; and an Opposition filed December 19, 1991 by KBC. The Applications for Review will be denied. Further comment, however, is warranted with respect to three matters raised in the Applications for Review.

2. KBC's principals, Jerry and Loy Lenamon, own and operate a local small business. In order to carry out their full-time integration proposals in this proceeding, KBC's principals have pledged to devote no more than 3 hours per week to the operation of their existing local business. Chase argues that *Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) and *Ronald Sorenson*, 6 FCC Rcd 6901 (1991), require integrated principals, who do not propose to sever completely their other business or employment commitments, to detail specific and credible evidence of how they will accommodate their outside interests with their integration proposals. Notwithstanding Chase's contentions, we agree with the Board that KBC's principals have detailed specific, credible evidence demonstrating that they can and will effectuate their integration proposal in this proceeding. *See* 6 FCC Rcd at 1350-52 ¶¶ 4-11.

3. Chase correctly argues that under *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 (1991), local residence and civic activities should be considered together to determine which applicant would better serve the community. Chase asserts that it is entitled to a decisional preference because of its superior record of community activities. Chase argues that it has shown more civic activities than KBC and that its activities are qualitatively superior to those of KBC, which allegedly reflect interests of a private nature (as a member of Mensa Mr. Lenamon worked on projects to raise money to fund college scholarships for local students, and as a member of a Bike Club he assisted in organizing events to raise money for local charities).

4. Chase does not dispute KBC's advantage based on its longer continuous local residence, and both applicants have listed a number of civic activities which have benefited the community and provided the applicants with an opportunity to become aware of the community's needs. In view of the eleemosynary objective accompanying Mr. Lenamon's activities, we do not agree with Chase's derogation of KBC's showing. Moreover, the credit awarded for Chase's activities must be diminished because many of them occurred after Chase filed its application. 5 FCC Rcd at 6662-63 ¶¶ 44, 46-47, 51. The Commission has long held that civic activities occurring after the filing of an application are of lesser significance. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991); *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶ 11 (1991); *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6440-41 ¶¶ 18-19 (Rev. Bd. 1989, *review denied*, 5 FCC Rcd 3712 (1990), and *Tallyrand Broadcasting*, 103 FCC 476, 480 n.5 (Rev. Bd. 1985). In this regard, the ALJ and the Board awarded equal credit to both applicants for their civic activities, and we fail to find any basis in Chase's arguments warranting a decisional difference in the credit to be awarded for their civic activities.

5. When consideration is given to KBC's longer continuous residence, it is clear that KBC's integration proposal is thus entitled to enhancement credit for its overall advantage on the local residence factor. On the other hand, Chase has an advantage only for its principal's broadcast experience. The enhancement credit awarded for broadcast experience, however, is of minor significance: it confers only an initial advantage; it is remediable; and placing greater emphasis on experience would discourage qualified newcomers from applying for broadcast stations. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Thus, we conclude that KBC's credit for local residence is sufficient, standing alone, to prevail over Chase's advantage for the lesser factor of broadcast experience. Moreover, the Board correctly awarded KBC credit for its 50 per cent female ownership. This is a separate and distinct enhancement factor, which further strengthens KBC's comparative superiority in this proceeding.

6. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed June 27, 1991 by Excelsior Communications, Inc. and by Chase Communications, Inc., and supplemented on December 4, 1991 by Chase Communications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed with
Open Network Architecture
Access Tariffs

ORDER

Adopted: December 20, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. This Order considers several petitions for waiver of the *TRP Order*[1] filed by the Bell Operating Companies (BOCs).[2] The *TRP Order* describes specific data formats for basic cost, demand, and rate information to be submitted by BOCs filing tariffs that implement their Open Network Architecture (ONA) plans, including the direct costs associated with each Basic Service Element (BSE).[3] To develop BSE direct costs, BOCs begin with the Switching Cost Information System (SCIS), developed and maintained by Bell Communications Research, Inc. (Bellcore), and other, similar computer models.[4] These computer models apportion joint and common switching investment between individual BSEs. In their petitions for waiver the BOCs ask us to waive the requirement that the BOCs file the SCIS model and certain other data. The BOCs contend that the SCIS model, containing switch vendor data, as well as inputs to the model supplied by the BOCs, and output reports generated by SCIS cost studies, all constitute proprietary materials that should be withheld from public disclosure.[5]

2. After conducting an *in camera* review of SCIS and its application in the context of Ameritech's ONA rate development for Illinois, and examining the summaries of methods used by state regulatory authorities to implement protected disclosure of SCIS, we have determined that the full SCIS model and supporting documentation, as well as associated BOC materials and vendor data, should not be available for public inspection. The model and supporting documentation would be exempt from mandatory disclosure under the FOIA, both because the model and documentation contain competitively sensitive materials and because disclosure of these materials would compromise agency programs.[6] Such considerations would not, of course, justify failing to provide these materials for inspection by Commission staff. We accordingly require each of the BOCs to submit its SCIS model for one study area and its complete SCIS inputs and outputs for all study areas, together with proprietary post-SCIS rate development elements and procedures, for *in camera* review by the Commission.[7] As a result of our action in this Order, the full SCIS model and supporting documentation will not be available for public inspection. We will determine questions relating to restricted access by active participants in this Commission proceeding in a subsequent order.

II. BACKGROUND

3. The *Part 69 ONA Order* authorizes local exchange carriers to use a flexible, cost-based approach for pricing new, and newly unbundled, ONA services.[8] Using this standard, the Commission requires price cap carriers to support new service offerings with cost support that: (1) satisfies the net revenue test; (2) identifies the direct costs of the new service; (3) includes an appropriate level of overhead costs; and (4) provides ratios of direct unit cost to unit investment, and direct unit cost to unit price. These materials, especially (2) and (4), enable the Com-

---

[1] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1168, released Sept. 19, 1991 (Com.Car.Bur.) (*TRP Order*).

[2] The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[3] The Commission specified the rate elements and corresponding cost support demonstration required to implement the BOCs' ONA plans in the *Part 69 ONA Order*. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[4] US West does not rely on SCIS for the development of BSE direct costs, but instead uses its own equivalent model, the Service Cost Model (SCM). Ameritech, in addition to SCIS, relies on a similar cost model, Common Channel Switching Cost Information System (CCSCIS), for the development of direct costs for the Remote Activation of Message Waiting -- Expanded element. Hereafter, we use the term SCIS to refer to these and any other corresponding computer models used by BOCs to develop direct BSE costs for ONA implementation.

[5] Requests for waiver of the *TRP Order* requirements in several respects not involving issues of SCIS disclosure were resolved in two earlier Orders. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1309, released Oct. 18, 1991 (Com.Car.Bur.) (*Ameritech TRP Waiver Order*), Erratum, DA 91-1345, released Oct. 28, 1991; Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1346, released Oct. 29, 1991 (Com.Car.Bur.) (*Non-SCIS TRP Waiver Order*). The *Ameritech TRP Waiver Order* resolved Ameritech's waiver requests not involving SCIS issues. The *Non-SCIS TRP Waiver Order* resolved non-SCIS waiver requests of the other six BOCs.

[6] *See* Critical Mass Energy Project v. NRC, 830 F.2d 278 (D.C. Cir. 1987) (*Critical Mass I*).

[7] Ameritech has already complied with this requirement.

[8] *Part 69 ONA Order*, 6 FCC Rcd at 4531.

mission to evaluate the reasonableness of resulting rates.[9] For the initial ONA tariff filings the BOCs must furnish cost information supporting their basic service elements (BSEs) as new services.[10]

4. The *Part 69 ONA Order* implemented an approach to pricing new services that accords BOCs reasonable flexibility to price efficiently and maintains the price cap incentives to innovate. At the same time, however, the Commission expressed concern that the local exchange carriers not set excessively high, predatorily low, or unreasonably discriminatory rates.[11] Accordingly, the *TRP Order* further specified the cost support material to be supplied in conjunction with ONA tariffs. The "cost support requirements included any engineering or cost accounting studies, such as SCIS, used in the development of BSE rates. Cost support materials filed with tariffs are routinely available for public inspection.[12] The *TRP Order* explained that to assess the reasonableness of the ONA rates, the Bureau and the intervenors need complete documentation of these studies.[13]

5. The BOCs use SCIS to attribute investment to individual services provided by switching equipment that uses shared equipment to provide many services. The SCIS model itself consists of algorithms developed and maintained by Bellcore, but its operation necessarily entails reliance on input data supplied by the BOCs and switch vendors.[14] One series of SCIS outputs constitute investment figures oriented to the eventual replacement cost of the switch, which are then further adjusted to generate the BOC's direct costs used as an element in the BSE rate development process. Bellcore licenses the SCIS model to BOCs and some non-BOC exchange carriers.[15]

6. The *TRP Order* provided that carriers unable to furnish the data required by that Order could file applications for waiver, demonstrating good cause for furnishing a different or lower level of cost support detail and indicating how these deficiencies would be rectified.[16] On September 27, 1991, the BOCs filed petitions for waiver of several aspects of the *TRP Order*, including requests by all BOCs for waiver of the filing requirements for SCIS.[17] Several BOCs attached illustrative nondisclosure agreements, employed to enable review of SCIS in state ratemaking proceedings, to their petitions for waiver. On October 4, 1991, American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom) filed comments regarding the BOCs' waiver petitions.

7. After reviewing these pleadings, the Bureau on October 18, 1991, released an Order addressing issues raised in Ameritech's TRP waiver petition. The *Ameritech TRP Waiver Order* accorded Ameritech's SCIS materials provisional protection against disclosure for purposes of conducting an *in camera* review, but deferred any final decision concerning the SCIS filing requirement and waiver requests until after that *in camera* review. Ameritech filed on October 25, 1991,[18] a copy of its SCIS model for the state of Illinois as well as supporting documents.[19]

8. The Tariff Division subsequently requested that each BOC file supplemental materials describing the extent and method of SCIS disclosure in state proceedings, and the BOCs filed this information on November 13, 1991. These supplemental materials show that BOCs have not provided what they consider proprietary SCIS information to state regulators absent a protective order or nondisclosure agreement.[20]

9. State public utility commissions requested and received a variety of SCIS information. Some state commissions had access to the SCIS model and full documentation.[21] In addition, in one state proceeding an apparently extensive, independent audit was conducted of the internal validity of Pacific's SCIS model; because the audit was conducted under a rigorous protective order and nondisclosure agreements, however, the regulatory authority's public report of the audit to the California state legislature was essentially devoid of descriptive

---

[9] In addition, the Order permits a carrier to include "risk premiums" the carrier believes it needs to supplement its rate of return for risky new services. *Id.* at 4531.

[10] Because BSEs unbundled from feature group arrangements will be offered as alternatives to those arrangements during a transition period, such BSEs constitute new offerings under price cap criteria. *Id.* at 4529, para. 25. In addition, BOCs must show revenue neutrality for the BSEs and BSAs unbundled from feature groups. *Id.* at 4532.

[11] *Id.* at 4531.

[12] 47 C.F.R. §§ 0.451(a), 0.455(b)(11).

[13] *TRP Order* at para. 3.

[14] Technical information provided Bellcore by switch vendors includes: long range product development plans and delivery schedules; detailed technical descriptions of switch architecture; hardware engineering rules and capacities; unit level prices of individual switching components; discount schedules; service descriptions (how the switch implements a particular service); and resource consumptions on a per feature or per function basis, as required. *See* NYNEX Transmittal 57, Description and Justification (D&J) Appendix B at 5.

[15] *See also* Bellcore Memorandum, Affidavit of James Britt. Several of the BOCs attach to their waiver petitions a memorandum from Bellcore discussing the proprietary nature of SCIS. They also attach an affidavit from the Bellcore employee responsible for maintaining SCIS. *See* Bell Atlantic, NYNEX, and Pacific Petitions.

[16] *TRP Order* at para. 24.

[17] Southwestern and US West filed contingency petitions for waiver. These carriers expressed an intent to file applications for review of the SCIS filing requirement. Southwestern did not file a petition for reconsideration. US West filed an application for review and petition for stay on October 4, 1991. In light of previous actions taken by the Bureau, and described at para. 7, US West's petition for stay is moot. Petitions for Reconsideration filed by AT&T and Northern Telecom are pending.

[18] The *Ameritech TRP Order* at para. 20 required Ameritech to file its SCIS model within 72 hours of the Order's October 18, 1991 release. On October 23, 1991 Ameritech filed a motion for extension of time requesting an extension of the filing requirement to and including October 25, 1991. The Bureau granted Ameritech's motion. Order, DA 91-1328, released Oct. 24, 1991.

[19] In a November 26, 1991, letter the Chief, Tariff Division, requested full SCIS information for other Ameritech study areas for a similar *in camera* review. Ameritech filed this information on December 9, 1991.

[20] The Florida Public Utilities Commission has not yet ruled on a BellSouth motion of confidentiality in one of its proceedings.

[21] *See* November 13 Reports of Ameritech, Pacific, Southwestern, and US West.

detail.[22] Other state commissions saw only redacted versions of the model, stripped of the specific carrier or vendor data necessary to track the rate development process; portions of the documentation; or some type of summary overview of the model.[23]

III. PLEADINGS

10. Petitioners suggest several grounds for precluding public inspection of the SCIS model and other documentation. First, argue the BOCs, SCIS constitutes a valuable trade secret which is proprietary to Bellcore. Bell Atlantic Petition at 2; BellSouth Petition at 4; NYNEX Petition at 2-3; Pacific Petition at 4; *see also* US West Petition at 3. Second, some BOCs assert that when using SCIS, the carrier inputs its own proprietary and confidential information, including negotiated pricing arrangements between itself and equipment vendors as well as sensitive demand information. BellSouth Petition at 5; NYNEX Petition at 4; *see also* Southwestern Petition at 2-3. In addition, the BOCs contend that the SCIS model contains engineering, pricing, and operational information that is proprietary to several switch manufacturers. Bell Atlantic Petition at 3; US West Petition at 6; *see also* BellSouth Petition at 4; Pacific Petition at 4.

11. Switch vendors also filed comments in support of waiver petitions filed by the BOCs.[24] Vendors argue that if the BOCs comply with the *TRP Order*, they will disclose vendor trade secrets and do irreparable harm to manufacturers. Ericsson Comments at 1; Northern Telecom Comments at 3. Ericsson urges the Bureau to consider alternatives. Ericsson offers support and cooperation for any alternative that prevents disclosure of Ericsson proprietary information. Ericsson Comments at 9. Northern Telecom agrees to consider specific proposals for public disclosure of information related to SCIS if the Commission establishes appropriate protections for the use and disclosure of the company's confidential and proprietary information. Northern Telecom Comments at 5-6.

12. US West offers to file SCM with the Bureau under Commission Rules for confidential treatment. US West Petition at 10;[25] *see* 47 C.F.R. §§ 0.457(d) & 0.459(a). US West's approach would place SCM in the Bureau's possession for a specific period of time, but would not allow public inspection of SCM. The carrier, however, refuses to agree to this approach without a Bureau Order, before the examination period, declaring SCM a trade secret and therefore protected under Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, and FOIA exemption 4.

13. MCI and AT&T filed oppositions to the BOCs' petitions for waiver.[26]

IV. DISCUSSION

14. Our *in camera* review of Ameritech's SCIS model, as well as the pleadings submitted in response to the *TRP Order*, reveals several different types of proprietary information issues at work in SCIS. First, vendor switch data concerning engineering and pricing surfaces directly in the SCIS software inputs and could also be "reverse engineered" from SCIS algorithms. The vendors' uncontested comments demonstrate the competitive nature of the switch market.[27] Their decision to reveal competitively sensitive data to Bellcore only pursuant to nondisclosure agreements is further evidence of the proprietary nature of the vendor data used in SCIS. We therefore determine that unrestricted public disclosure of this data would cause competitive harm to switch vendors.

15. We also find that BOC inputs used to generate SCIS investment studies are also competitively sensitive, because through their disclosure other BOCs and switch vendors might use them to determine pricing strategies, forecasts of expected financial position regarding switch technologies, and learn negotiated pricing arrangements between the BOCs and switch vendors. Technology-specific outputs for individual BOCs' studies are competitively sensitive because they must be provided by switch technology to enable reviews of the full BOC rate development process. These switch-specific outputs would also allow competitors of switch vendors a means to gain valuable vendor pricing and switch engineering data.

16. As to the SCIS model itself, it is not only a valuable intellectual property developed for the use of BOCs and others, which if disclosed would enable the avoidance of substantial licensing fees, but the algorithms that are the core of the model are mathematical expressions of the technical and cost characteristics of specific switch technologies. As such, their disclosure would present all the competitive harms expected from direct disclosure of vendors' SCIS input data, once the algorithms were reversed engineered to disclose the details of the technologies they replicate.

17. Another important factor in our decision is that the implementation of ONA, a Commission priority, requires a rational means for apportioning joint and common switching costs between the BOCs' numerous BSE offerings. If switch vendors refuse to provide data for the SCIS model, the BOCs may be unable to develop an adequate alternative method to apportion investment. We presume that any alternatives to SCIS will rely on similar modeling methodology and will again require the use of proprietary data. The courts have construed FOIA exemption 4 to embrace situations such as this in which, apart from private competitive harms, disclosure would impair

---

[22] *See* Pacific Petition at 1.

[23] *See* November 13 Reports of Bell Atlantic at 1-2, NYNEX at 1-2, Southwestern, US West at 3.

[24] The *Ameritech TRP Order* granted Northern Telecom's petition for declaratory ruling that parties who provide proprietary information to the BOCs, which the Commission then requires the BOCs to submit, have standing to request confidentiality for that information. *Ameritech TRP Order* at para. 1 n.4.

[25] US West filed an erratum for page 10 on October 1, 1991. This summary cites the erratum.

[26] AT&T has submitted comments only as an interexchange carrier, not in its role as a switch vendor.

[27] Trade press accounts of this market also describe structural elements that include (1) excess supply; (2) strong domestic and foreign competition; and (3) consequent tightening of competitive bidding strategy. *See, e.g.*, "Turmoil Pervades the Telephone System Industry," *Business Communications Review*, July 1991; "The Global CO Switch Market: A Tough Game Gets Even Tougher," *Telephony*, July 23, 1990; "Confronting Low Bids and

the effectiveness or efficiency of agency programs.[28] Thus, both the original statutory intent animating exemption 4 of the FOIA, 5 U.S.C. § 552, and the judicially developed understanding of that provision, exempt the SCIS model and associated switch vendor inputs from mandatory FOIA disclosure.

18. Based on our *in camera* review of Ameritech's SCIS model and the pleadings, we determine that the SCIS model used by the various BOCs is very similar in its basic algorithms. Therefore, the Bureau concludes that all versions of the SCIS model, including associated vendor and BOC inputs, contain proprietary information.[29] Our review also shows that individual carriers have many opportunities to customize the model through various decision points and user inputs. These opportunities cannot be practically or usefully separated from the model's operation; the specific decisions made by BOCs when generating SCIS studies involve the application of proprietary data to the model. Our *in camera* review of the Ameritech SCIS model, in the context of Ameritech's overall ONA rate development process, has confirmed the presence and significance of multiple decision points and data elements in the SCIS-based aspects of Ameritech's cost development process, including (1) BOC and switch vendor inputs to SCIS; (2) the algorithms constituting the model proper; and (3) possible variants in the operation (and results) of SCIS cost studies that are introduced by user-determined parameters. These SCIS-related aspects of the BOC rate development process are intimately related to the model and equally exempt from mandatory disclosure under FOIA.

V. ORDERING CLAUSES

19. We have determined that the SCIS model licensed by Bellcore to the BOCs, the SCM model, as well as associated data from switch vendors, constitute confidential materials exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459.

20. Accordingly, IT IS ORDERED pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for nondisclosure submitted as part of petitions for waiver of Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1168, released Sept. 19, 1991, filed by the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell and Nevada Bell, Southwestern Bell Telephone Company, and US West Communications, Inc., ARE GRANTED to the extent provided herein.

21. IT IS FURTHER ORDERED, that the requirement of simultaneous submission of sensitive materials with a request for confidential treatment, specified in Section 0.459(a) of the Commission's Rules, 47 C.F.R. § 0.459(a), IS WAIVED for purposes of the Switching Cost Information System and Service Cost Model materials to be submitted by the Bell Operating Companies under the terms of this Order.

22. IT IS FURTHER ORDERED that the Bell Operating Companies shall provide their Switching Cost Information System or Service Cost Model for one study area and their Switching Cost Information System and Service Cost Model inputs, and outputs for all study areas, to the Bureau not later than one week after the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Support Gaps," *Business Communications Review*, December 1989; "U.S. Central Office Switch Market," *Telecommunications*, February 1987.

[28] Critical Mass Energy Project v. NRC, 830 F.2d 278 (D.C. Cir. 1987) (*Critical Mass I*). As the reviewing court in *Critical Mass I* found that no record evidence had been adduced to support the district court's determination that the program interests involved were or might be affected by disclosure, the subsequent history of that case does not affect this reading of Exemption 4. *See also* 9 to 5 Organization for Women Office Workers v. Board of Governors, 721 F.2d 1, 9 (1st Cir. 1983).

[29] Our conclusion includes a preliminary determination that US West's SCM model also constitutes proprietary information. Although the Bureau has not seen any version of the SCM model, US West indicates that it based SCM on the SCIS model. *See* US West Petition for Waiver at 4 & n. 8. All pleadings indicate that SCM is similar in nature to SCIS.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier Line
Information Database

ORDER

Adopted: December 30, 1991; Released: December 30, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), GTE Telephone Operating Companies (GTE), NYNEX Telephone Companies (NYNEX), Pacific Bell Telephone Companies (Pacific Bell), Southwestern Bell Telephone Company (SWB), United Telephone System (United), and US West, Inc. (US West) have filed petitions for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish rate elements for transmission services connecting customers to the carriers' common channel signaling networks (CCS) and to establish rate elements for access to the data in their line information databases (LIDB). The above carriers have also filed tariffs for CCS access and LIDB. These tariffs are scheduled to take effect on December 31, 1991. Several pleadings have been filed in response to the above waiver petitions and tariffs.

2. For the reasons discussed below, we hereby grant the requested waivers to the extent that they comply with the *Southwestern Bell LIDB Order*.[1] We also suspend these transmittals for one day, impose an accounting order, and initiate an investigation of the tariffs captioned above.

II. WAIVER PETITIONS

A. Background

3. LIDB[2] is a database created by local exchange carriers (LECs). These databases are interconnected in order to enable LECs to share with each other and with interested third parties data on the account status [3] of LEC joint use calling cards,[4] as well as information on line numbers, such as third party billing exceptions.[5] This information is stored in LIDB and updated by the LECs on a regular basis. LIDB service will enable LEC customers such as interexchange carriers (IXCs) to query the database to determine whether a caller is the authorized user of a valid LEC joint use card, or whether a particular telephone number can accept collect or third-party billed calls, before transmitting any call using that card or line number.

4. Both the LECs and the IXCs have developed CCS networks which operate as part of their switched networks to assist in the routing and delivery of telecommunications traffic. Many of the carriers' services that use CCS network capabilities (including LIDB) will require the LECs and their customers to interconnect their CCS networks. CCS interconnection service requires at a minimum one 56 kilobit per second (kbps) link connecting an IXC's CCS network to the signaling transfer points (STPs) in the LEC's network. This link can be used by the LEC to transmit out-of-band signaling information to IXCs, which provides IXCs with faster call set-up than is possible with in-band signaling. CCS interconnection service also enables the IXC to transmit queries to STPs and thence to LEC databases, like the queries an IXC sends to LIDB for purposes of calling card validation or third party billing information.

5. On October 4, 1991, the Common Carrier Bureau released our decision granting the petition for waiver filed by Southwestern Bell to establish new rate elements for provision of LIDB services.[6] Specifically, the Bureau permitted Southwestern Bell to recover the costs of LIDB service through two separate charges, one which recovers the costs of the STP facilities and the transmission lines dedicated exclusively to LIDB, and one which recovers the costs of the service control point (SCP) which is the database itself.[7] We also granted Southwestern Bell's CCS interconnection waiver to the extent necessary to create two new transport elements. The first of these is a charge per port for the STP port in which the transmission facility between the IXC's signaling point of interconnection (SPOI) and the LEC's signaling network terminates. The second subelement is a charge per line which recovers the costs of the transmission facility itself.[8] We granted those waivers on an interim basis, pending the outcome of the Commission's rulemaking proceedings in the *Cincinnati Bell Rulemaking* and CC Dockets 91-141[9] and 91-213.[10]

B. Petitions

6. Following the release of the *Southwestern Bell LIDB Order*, Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific Bell, United, and US West filed petitions

---

[1] Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, DA 91-1258, 6 FCC Rcd 6095 (Com.Car.Bur. 1991) (*Southwestern Bell LIDB Order*).

[2] Unless otherwise indicated, the acronym "LIDB" is an abbreviation for Line Information Database (or Data Base).

[3] *See* Cincinnati Bell Telephone Co., CC Docket No. 323, 6 FCC Rcd 3501, 3501 n.2 (1991) (*Cincinnati Bell Final Order*).

[4] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 6 FCC Rcd 3506, 3506 n.1 (1991) (*Cincinnati Bell Rulemaking*).

[5] *Id.* at 3507 n.4.

[6] *See Southwestern Bell LIDB Order*.

[7] *See id.* at 6098.

[8] *See id.* at 6099-6100.

[9] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Rulemaking*).

[10] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 6126 (1991) (*Transport Rulemaking*).

for waiver of Part 69 of the Commission's Rules, in which they seek authority to establish the rate elements which Southwestern Bell was permitted to establish in the *Southwestern Bell LIDB Order*.

7. Ameritech filed two separate waiver petitions on November 12, 1991, to establish CCS access the SPOI-to-STP port transmission service and LIDB service (the database query service). United filed a waiver petition on November 15, 1991, to establish access service rates and regulations for the provision of Common Channel Signaling/Signaling System 7 Interconnection Service (CCS/SS7) and LIDB Access Service.

8. Several carriers filed waiver petitions which they subsequently clarified or amended. *See* Bell Atlantic Amendment to Petition for Waiver, filed November 14, 1991, and Bell Atlantic Petition for Waiver, filed November 20, 1991; BellSouth Petition for Waiver, filed November 14, 1991; GTE Petition for Waiver, filed October 21, 1991, as amended November 1, 1991; NYNEX Petition for Waiver, filed November 8, 1991, as amended December 6, 1991, and NYNEX Petition for Waiver, filed December 11, 1991; Pacific Bell Petition for Waiver, filed November 8, 1991, and petition for waiver filed December 23, 1991; US West Petition for Waiver, filed October 25, 1991, as amended on November 12, 1991. On October 25, 1991, US West also filed a motion for partial withdrawal of the portion of its August 1, 1991 petition for waiver that concerns CCS Access Capability (CCSAC). As a result of the above filings, each of these carriers has requested waiver of Part 69 of the Commission's Rules to establish the four rate elements[11] which Southwestern Bell was permitted to establish in the *Southwestern Bell LIDB Order*.[12]

C. Pleadings

1. *Ameritech*

9. On November 21, 1991, Allnet Communication Services, Inc. (Allnet) filed an opposition to the petition for waiver filed by Ameritech.[13] In its opposition, Allnet argues that Ameritech is not requesting a waiver of Part 69 of the Commission's Rules but is in fact seeking a reconsideration of the Commission's *Ameritech Order* which rejected Ameritech's attempt to obtain the identical waiver sought here for CCS7 interconnection.[14] Allnet asserts that Ameritech's petition relies solely upon the *Southwestern Bell LIDB Order*, and claims that this reliance is misplaced.[15] Allnet further argues that Ameritech can offer LIDB access today without a waiver.[16]

2. *Bell Atlantic* 8.

10. On November 25, 1991, Allnet filed an opposition to the petition for waiver filed by Bell Atlantic on November 14, 1991.[17] Allnet argues that Bell Atlantic should be required to provide CCS interconnection free of charge, and that the *Southwestern Bell LIDB Order* provides no basis for Bell Atlantic's proposal to charge for CCS interconnection.[18]

3. *BellSouth*

11. On November 25, 1991, Allnet filed an opposition to the petition for waiver filed by BellSouth.[19] Allnet urges the Commission to deny the waiver to the extent that it requests that separate rate elements be established for the recovery of CCS interconnection costs.[20] Allnet argues that the costs for CCS are already being recovered through the existing switched access revenue of BellSouth, and insists that there is no reason to reverse the policy established in the *Ameritech Order*.[21]

4. *US West*

12. On November 7, 1991, Allnet filed comments concerning US West's October 25, 1991, motion to withdraw partially its August 1, 1991 petition.[22] US West filed a reply to Allnet's, comments on November 22, 1991.[23]

13. Allnet argues that US West is filing a rate structure that is consistent with the *Southwestern Bell LIDB Order*, and insists that such action is improper. Allnet claims that the conclusion in the *Southwestern Bell LIDB Order*

---

[11] Although BellSouth's waiver petition incorrectly states that all of the new subelements are subelements of a new LIDB access element, we grant BellSouth a waiver to establish its LIDB query service as two subelements of a new LIDB access element, and to establish its CCS interconnection service as a new subelement of the transport access element, as we did in the *Southwestern Bell LIDB Order*.

[12] *See* para. 5, *supra*.

[13] Ameritech submitted a reply to Allnet's opposition on December 5, 1991. Pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), replies were due no later than November 29, 1991. Therefore, we will not consider Ameritech's reply.

[14] *See* Allnet Petition at 1, *citing* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 396, 420, 480, and 498, Order, 6 FCC Rcd 746 (Com.Car.Bur. 1991) (*Ameritech Order*).

[15] *Id.* at 2.

[16] *Id.* at 2-3.

[17] Bell Atlantic filed a reply to Allnet's opposition on December 5, 1991. Pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), replies were due no later than December 3, 1991. Bell Atlantic did not file a motion to accept its late reply. Therefore, we will not consider Bell Atlantic's reply.

[18] Allnet Opposition at 2-3.

[19] BellSouth filed a reply to Allnet's opposition on December 6, 1991. Pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), replies were due no later than December 3, 1991. BellSouth did not file a motion to accept its late reply. Therefore, we will not consider BellSouth's reply.

[20] Allnet Petition Against BellSouth Waiver at 1.

[21] *Id.* at 2-4.

[22] On November 12, 1991, US Sprint Communications Company Limited Partnership (Sprint) filed comments in response to the petition of US West for waiver of Part 69 of the Commission's Rules. Pursuant to Section 1.45(a) of the Commission's Rules, 47 C.F.R. § 1.45(a), comments in response to US West's petition for waiver should have been filed no later than November 4, 1991. Sprint did not file a motion to accept its late comments. Therefore, we will not consider Sprint's comments. US West filed a reply to Sprint's comments on November 20, 1991. Because we are not accepting Sprints comments, it is unnecessary to consider US West's reply.

[23] US West, filing its reply two days late, also filed a motion for late acceptance, citing the fact that Allnet did not serve US West with a copy of its comments. Through its own efforts, US West was able to obtain a copy of Allnet's comments on November 14, 1991. US West's motion for late acceptance is hereby granted.

that the existing Part 69 Rules fail to accommodate CCS interconnection charges is erroneous and inconsistent with the *Ameritech Order*.[24]

14. US West replies that Allnet's comments have no merit and should be rejected. US West asserts that Allnet is arguing that no new rate elements are needed for the recovery of CCSAC costs. US West contends that Allnet, by contending that the *Ameritech Order* should control, and not the *Southwestern Bell LIDB Order*, is attacking actions taken by the Bureau, not US West Transmittal 203. Therefore, says US West, the Bureau should reject Allnet's contentions.[25]

D. Discussion

15. The petitioners request waivers of Part 69 of the Commission's Rules to establish the same rate structure that the Bureau granted to Southwestern Bell in the *Southwestern Bell LIDB Order*. Specifically, the Bureau granted the Southwestern Bell waiver petition to establish two subelements for the new LIDB access element: a charge per LIDB query which recovers the costs of the STP ports and the transmission lines connecting the LIDB SCP to the LEC's CCS network, and a charge per query which recovers the costs of the SCP. The *Southwestern Bell LIDB Order* also permitted Southwestern Bell to establish two new transport subelements in the transport element: a charge per line to recover the costs of the link between the IXC SPOI and a LEC STP and a charge per port to recover the costs of the STP port at which the CCS link terminates.[26] Because the waiver petitions seek authority to establish the rate structure approved in the *Southwestern Bell Order*, they are hereby granted for the reasons discussed in that *Order*.

III. TARIFF FILINGS

A. Transmittals

1. *Ameritech*

16. Ameritech filed Transmittal No. 574 to introduce "Signal Transfer Point (STP) Access" which allows a customer to interconnect with Ameritech's "Common Channel Signaling (CCS) network," and Transmittal No. 575 to introduce "Line Information Data Base (LIDB) service," on November 12, 1991. Ameritech filed Transmittal No. 586 on December 13, 1991, to provide revisions to the support material for Ameritech's STP access filing, Transmittal No. 574. Ameritech also amended Transmittal No. 575 on December 13, 1991, to modify the cost support material and the net revenue test originally filed in Transmittal No. 575. On December 19, 1991, Ameritech filed Transmittal No. 587 to clarify the requirements for "Signal Transfer Point (STP) Access."

2. *Bell Atlantic*

17. Bell Atlantic filed Transmittal No. 476 to establish the rates for "Common Channel Signaling Access Service" and a "Billing Validation Service" on November 20, 1991. Each customer arrangement will consist of a dedicated 56 kbps channel and an STP port.

3. *BellSouth*

18. BellSouth filed Transmittal No. 439 to establish the rates for a "Line Information Data Base (LIDB) Access Service" on November 15, 1991. This service will provide the customer with the ability to query billing validation data contained in BellSouth's LIDB.

4. *GTE*

19. GTE filed Transmittal Nos. 691 and 692 on November 14, 1991, to establish new switched access rate elements for "Common Channel Signaling System 7 (CCS7) Access service" and for "LIDB Query service."

5. *NYNEX*

20. NYNEX filed Transmittal No. 60 on November 15, 1991 to introduce rates for "Line Information Data Base (LIDB) Access Service." NYNEX filed Transmittal No. 61 on November 22, 1991, to correct Transmittal No. 60. Transmittal No. 67 on December 11, 1991, to modify LIDB access to be consistent with the *Southwestern Bell LIDB Order*, and Transmittal No. 70, on December 13, 1991, to modify its CCS provisions by establishing rates for interconnection consistent with the *Southwestern Bell LIDB Order*.

6. *Pacific Bell*

21. Pacific Bell filed Transmittal No. 1557 to introduce "Line Information Data Base (LIDB)" as a new service, on November 15, 1991. On November 25, 1991, Pacific Bell filed Transmittal No. 1558, to correct the rates for the LIDB Transport and LIDB Query rate elements. According to Transmittal No. 1558, these two rate elements were inadvertently transposed in Transmittal No. 1557. On December 24, 1991, Pacific Bell filed Transmittal No. 1562, to convert the LIDB nonrecurring charge from a one-time service establishment charge to a charge applicable to each originating point code established in Pacific Bell's LIDB data base, and to introduce a rate structure for "SS7 interconnection" consistent with the *Southwestern Bell LIDB Order*.

7. *Southwestern Bell*

22. On November 4, 1991, Southwestern Bell, pursuant to the *Southwestern Bell LIDB Order*, filed Transmittal No. 2148 to establish a new switched access rate element for the provisioning of "Common Channel

[24] Allnet Comments on US West Motion for Partial Withdrawal of Petition for Waiver at 1, *citing Ameritech Order*.
[25] US West Reply to Allnet's Comments on US West's Motion for Partial Withdrawal of Petition for Waiver at 2-3.
[26] *See Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099.

Signaling/Signaling System 7 (CCS/SS7) Interconnection Service," and Transmittal No. 2149 to introduce "Line Information Data Base (LIDB) Validation Service."

8. ***United***

23. United filed Transmittal No. 287 to introduce access service rates for "Common Channel Signaling/ Signaling System 7 (CCS/SS7) Interconnection Service" and "Line Information Data Base (LIDB) Access Service" on November 15, 1991.

9. ***US West***

24. US West filed Transmittal No. 203 on October 25, 1991, to introduce "Common Channel Signaling Access Capability (CCSAC)" and "Line Information Data Base (LIDB)" service, and filed a letter correcting Transmittal 203 on November 27, 1991. Under Transmittal No. 219, filed on December 16, 1991, US West further modified the initial filing to introduce a 56 kbps capacity option for CCSAC in addition to the DS1 capacity option defined in Transmittal No. 203.

B. Pleadings

1. ***Ameritech***

25. Allnet filed petitions to reject Ameritech Transmittal No. 574 and Transmittal No. 575 on November 27, 1991. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Ameritech Transmittal No. 574, and a petition to reject or to suspend and investigate Ameritech Transmittal No. 575 on November 27, 1991.[27] Sprint filed a petition to suspend and investigate Transmittal Nos. 574 and 575 on November 27, 1991. On December 9, 1991, Ameritech filed one reply to all of the petitions against Transmittal No. 574, and one reply to all of the petitions against Transmittal No. 575.

26. Allnet, MCI, and Sprint all argue that the cost support for Transmittal Nos. 574 and 575 is insufficient and claim that the rates are unreasonably high.[28] Sprint asserts that Ameritech's loading factors are unsupported and unreasonable.[29] MCI argues that the terms and conditions in Ameritech's LIDB tariff are unreasonably vague.[30] Allnet complains that Ameritech is placing an undue cost burden on small IXCs by requiring customers to purchase a DS1 facility in order to access LIDB, regardless of a customer's need for all of the capacity on a DS1.[31]

27. Ameritech replies that its proposed STP port rate has been fully supported. Ameritech also argues that the terms and conditions for STP access are reasonable.[32] Ameritech also claims that Allnet is incorrect and asserts that Transmittal No. 574 does not require a customer to purchase a DS1 to obtain STP access. Rather, Ameritech asserts that it will multiplex the customer's 56 kbps circuit into a DS1 bit stream at the customer's wire servicing center to meet the technical specifications required for interconnection to the CCS network.[33]

28. Ameritech also challenges MCI's assertion that the terms and conditions in the LIDB tariff are unreasonably vague, arguing that MCI is attempting to create a new requirement which is inappropriate and overly burdensome.[34] Ameritech also asserts the rates for LIDB validation recover their fully distributed cost and also pass the net revenue test. Furthermore, argues Ameritech, when the rates for LIDB validation service are compared with rates charged by other validation service providers they are reasonable.[35]

2. ***Bell Atlantic***

29. On December 5, 1991, Allnet, MCI, and Sprint filed petitions to reject or suspend and investigate Bell Atlantic Transmittal No. 476. Bell Atlantic filed a reply to these petitions on December 16, 1991.

30. Allnet, MCI, and Sprint all argue that the cost support for Transmittal No. 476 is insufficient and claim that the rates are unreasonably high.[36] Allnet alleges that Bell Atlantic improperly uses existing 56 kbps DDS channel mileage rates for establishing the rates for the links between the access customers' SPOI and the STP.[37] Sprint charges that Bell Atlantic uses questionable demand forecasts for Billing Validation Service (BVS) query validation.[38] Sprint also asserts that Bell Atlantic's loading factors are unsupported and unreasonable.[39] MCI argues that the terms and conditions in Bell Atlantic's LIDB tariff are unreasonably vague.[40]

31. Bell Atlantic replies that its cost support is sufficient and that its rates are reasonable.[41] Bell Atlantic Data Service (DDS) because there is no material difference between that service and Common Channel Signaling Access Service (CCSAS) links, although these links will be treated as switched access services for accounting and other purposes.[42] Bell Atlantic contends that its demand forecast is based on its experience with carrier demand for Bell Atlantic's IQ card and is reasonable.[43] Bell Atlantic asserts that its loading factors are reasonable.[44] Finally, Bell Atlantic argues that MCI's claims that the terms of

---

[27] The petition filed by MCI is a consolidated petition against Ameritech, GTE, Bell Atlantic, BellSouth, Pacific Bell, and NYNEX.

[28] *See* Allnet Petition Against Ameritech Tr. 574 at 3-5; MCI Petition Against Ameritech Tr. 574 at 3-4; MCI Petition Against Ameritech Tr. 575 at 79; Sprint Petition Against Ameritech Trs. 574 and 575 at 2-9.

[29] Sprint Petition Against Ameritech Trs. 574 and 575 at 7-9.

[30] MCI Petition Against Ameritech Tr. 575 at 3-5.

[31] Allnet Petition Against Ameritech Tr. 574 at 5-6.

[32] Ameritech Reply to Petitions Against Tr. 574 at 2-6.

[33] *Id.* at 4.

[34] Ameritech Reply to Petitions Against Ameritech Tr. 575 at 2-3.

[35] Ameritech Reply to Petitions Against Tr. 575 at 7.

[36] Allnet Petition Against Bell Atlantic Tr. 476 at 2-4; MCI Petition Against Bell Atlantic Tr. 476 at 7-9; Sprint Petition Against Bell Atlantic Tr. 476 at 2-4.

[37] Allnet Petition Against Bell Atlantic Tr. 476 at 2-3.

[38] Sprint Petition Against Bell Atlantic Tr. 476 at 5-6. *See also* Allnet Petition Against Bell Atlantic Tr. 476 at 2 n.3.

[39] Sprint Petition at 7-9.

[40] MCI Petition Against Bell Atlantic Tr. 476 at 3-5.

[41] Bell Atlantic Reply to Petitions Against Tr. 476 at 2-10.

[42] *Id.* at 2-3.

[43] *Id.* at 6-7.

[44] *Id.* at 7-8.

the tariff are unreasonably vague are incorrect, and asserts that MCI's suggested changes indicate a lack of understanding of the service offering.[45]

3. *BellSouth*

32. MCI filed a petition to reject or suspend and investigate BellSouth Transmittal No. 439 on November 27, 1991. Allnet filed a petition to reject the transmittal on December 2, 1991. Sprint filed a petition to suspend and investigate the transmittal on December 2, 1991. BellSouth filed a reply to these petitions on December 12, 1991.

33. Allnet, MCI, and Sprint all argue that the cost support for Transmittal No. 439 is insufficient and claim that the rates are unreasonably high.[46] MCI charges that BellSouth improperly alludes to the CCSIC[47] model for calculating investment.[48] Allnet and Sprint assert that BellSouth's loading factors are unsupported and unreasonable.[49] MCI argues that the terms and conditions in BellSouth's LIDB tariff are unreasonably vague.[50]

34. BellSouth replies that its cost support is adequate and that Transmittal 439 meets all pricing requirements of the Commission's rules.[51] BellSouth also contends that its loading factors are reasonable and that it uses the same methodology to derive incremental costs for both the Local Transport category and for the LIDB access service rate elements.[52] BellSouth also argues that Transmittal 439 sufficiently describes the terms and conditions applicable to LIDB access service.[53]

4. *GTE*

35. On November 27, 1991, MCI filed a petition to reject, or suspend and investigate GTE Transmittal No. 691, and a petition to reject, or suspend and investigate GTE Transmittal No. 692. GTE filed one reply to both petitions on December 9, 1991.

36. MCI charges that GTE uses questionable demand forecasts which distort the information shown in the net revenue test.[54] MCI also claims that GTE's proposed credit allowance, which applies only after 30 minutes or more of outage time, is unreasonable.[55] MCI further argues that the cost support for the LIDB rates in Transmittal 692 is insufficient and claims that the rates are unreasonably high.[56] Finally, MCI argues that the terms and conditions in GTE's LIDB tariff are unreasonably vague.[57]

37. GTE replies that MCI's analysis of GTE's demand projections is incomplete and erroneous.[58] GTE asserts that its time out of service requirement of a 30 minute or more outage period for a credit allowance is warranted and does not impose an unreasonable term or condition.[59] GTE also contends that the interconnection to GTE's CCS network and LIDB validation system is clearly defined, and that the terms and conditions for LIDB Query service are clear and not discriminatory.[60] Finally, GTE asserts that GTE's LIDB service rates are cost based and the underlying costs of that service are properly allocated.[61]

5. *NYNEX*

38. On November 27, 1991, MCI filed a petition to reject, or suspend and investigate NYNEX Transmittal No. 60. On December 2, 1991, Sprint filed a petition to suspend and investigate the NYNEX transmittal. NYNEX filed one opposition to both petitions on December 12, 1991.

39. MCI and Sprint argue that the cost support for NYNEX Transmittal No. 60 is insufficient and claim that the rates are unreasonably high.[62] MCI also alleges that the terms and conditions in NYNEX's tariff are unreasonably vague.[63]

40. NYNEX replies that its LIDB access service rates are not excessive and that NYNEX's cost support is in compliance with the requirements of the Commission's *Part 69 ONA Order* and therefore is adequate.[64] NYNEX also claims that MCI's contentions concerning the terms and conditions proposed by NYNEX for LIDB access service are unfounded.[65]

6. *Pacific Bell*

41. On November 27, 1991, MCI filed a petition to reject, or suspend and investigate Pacific Bell Transmittal No. 1557. On (December 2, 1991, Sprint filed a petition to suspend and investigate the Pacific Bell transmittal. Pacific Bell filed a reply on December 12, 1991.

42. MCI and Sprint argue that the cost support for Pacific Bell Transmittal No. 1557 is insufficient and claim that the rates are unreasonably high.[66] MCI protests that Pacific Bell references the Bellcore Switching Cost Information System (SCIS) model in its cost support for LIDB service.[67] Sprint alleges that Pacific Bell's loading

---

[45] *Id.* at 8-10.

[46] Allnet Petition Against BellSouth Tr. 439 at 4-5; MCI Petition Against BellSouth Tr. 439 at 7-9; Sprint Petition Against BellSouth Tr. 439 at 2-6.

[47] Although MCI does not define this acronym, we assume that they are referring to the Common Channel Signaling Cost Information System (CCSCIS) model.

[48] MCI Petition Against BellSouth Tr. 439 at 8.

[49] Allnet Petition Against BellSouth Tr. 439 at 4-5; Sprint Petition Against BellSouth Tr. 439 at 2-6. at 7-9.

[50] MCI Petition Against BellSouth Tr. 439 at 3-5.

[51] BellSouth Reply to Petitions Against Tr. 439 at 2-9.

[52] *Id.* at 7-9.

[53] *Id.* at 4-7.

[54] MCI Petition Against GTE Tr. 691 at 2-3.

[55] *Id.* at 3-5.

[56] MCI Petition Against GTE Tr. 692 at 7-9.

[57] *Id.* at 7-9.

[58] GTE Reply at 3-6.

[59] *Id.* at 6.

[60] *Id.* at 7-9.

[61] *Id.* at 11.

[62] MCI Petition Against NYNEX Tr. 60 at 7-9; Sprint Petition Against NYNEX Tr. 60 at 2-3.

[63] MCI Petition Against Transmittal 575 at 3-5.

[64] NYNEX Opposition to Petitions to Reject or Suspend Tr. 60 at 8-11. (*citing* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order).*

[65] *Id.* at 4-8.

[66] MCI Petition Against Pacific Bell Tr. 1557 at 3-5; Sprint Petition Against Pacific Bell Tr. 1557 at 2-5.

[67] MCI Petition Against Pacific Bell Tr. 1557 at 8.

factor is unreasonably high.[68] MCI also charges that the terms and conditions in Pacific Bell's tariff are unreasonably vague.[69]

43. Pacific Bell replies that the rates for LIDB service have been sufficiently cost justified and contends that, because the SCIS model is proprietary, MCI, unlike the Commission, has no right to examine cost support information regarding that model.[70] Pacific Bell also argues that its loading factor is reasonable, noting that this was the average loading factor for Pacific Bell's switched services in 1990.[71] Pacific Bell disputes charges that the terms and conditions of its tariff are unreasonably vague, arguing that additional network performance standards are unnecessary.[72]

7. ***Southwestern Bell***

44. Allnet filed a petition to reject SWB Transmittal Nos. 2148 and 2149 on November 19, 1991. MCI filed one petition to reject or suspend and investigate SWB Transmittal No. 2148, and one petition to reject or suspend and investigate SWB Transmittal No. 2149 on November 19, 1991. Sprint filed a petition to suspend and investigate both transmittals on November 19, 1991. On November 27, 1991, SWB filed one reply to the petitions against Transmittal No. 2148, and another reply to the petitions against Transmittal No. 2149.

45. Allnet, MCI, and Sprint argue that the cost support for SWB Transmittal Nos. 2148 and 2149 is insufficient and claim that the rates are unreasonably high.[73] Allnet asserts that SWB is treating CCS links as special access, in direct conflict with the *Southwestern Bell LIDB Order*.[74] Allnet contends that SWB has set up its STP access mileage bands to favor AT&T.[75] Allnet claims that SWB's loading factors are unsupported and unreasonable.[76] Allnet and MCI complain that SWB uses questionable demand forecasts for LIDB validation.[77] MCI also alleges that the terms and conditions in SWB's LIDB tariff are unreasonably vague.[78]

46. SWB replies that SWB has provided sufficient cost support data for both tariffs and is in compliance with the *Part 69 ONA Order*.[79] In response to claims that the CCS link is being treated as special access, SWB replies that Allnet is mistaken. The STP access mileage is provided as a transport subelement.[80] Further, says SWB, the STP access mileage band does not favor AT&T.[81] SWB argues that its estimate of no growth in demand for SWB's LIDB validation service is accurate because additional queries from new customers will balance the loss of queries attributable to calling card competition.[82] SWB also claims that MCI's contentions concerning the terms and conditions for SWB's LIDB access service are unfounded.[83]

8. ***United***

47. On November 27, 1991, MCI filed a petition to reject or suspend and investigate United Transmittal No. 287. United filed a reply on December 9, 1991.

48. MCI argues that the cost support for United Transmittal No. 287 is inadequate and claims that the rates are excessive.[84] MCI complains that United fails to include any documentation of the Common Channel Signaling Cost Information System model it uses to determine the direct capital costs for an STP port.[85] MCI also contends that the demand forecasts of United are questionable.[86] MCI further alleges that the terms and conditions in United's tariff are unreasonably vague.[87]

49. United replies that its rates are reasonable and that its cost support is adequate. United argues that simply loading LIDB expenses into United's access rates, as MCI suggests, would unreasonably charge all interexchange carriers for LIDB usage regardless of whether such carriers are LIDB subscribers or even accept calling cards, collect calls, and third party billing.[88] United disputes MCI's claim that the cost support model is unavailable for inspection, arguing that the costs used by United are thoroughly documented in the description and justification.[89] United also disputes MCI's claims that demand forecasts

---

68 Sprint Petition Against Pacific Bell Tr. 1557 at 2-5.
69 MCI Petition Against Pacific Bell Tr. 1557 at 3-5.
70 Pacific Bell Reply to Petitions Against Tr. 1557 at 4-7.
71 *Id.* at 6. Pacific Bell also disputes Sprint's claim that Pacific Bell should have developed its loading factor using the switched transport category instead of total access.
72 *Id.* at 7-12.
73 Allnet Petition Against SWB Trs. 2148 and 2149 at 1-2, 8-10; MCI Petition Against SWB Tr. 2148 at 3-6; MCI Petition Against SWB Tr. 2149 at 911; Sprint Petition Against SWB Trs. 2148 and 2149 at 2-3.
74 Allnet Petition Against Trs. 2148 and 2149 at 4-6.
75 *Id.* at 9-10.
76 *Id.* at 8-9.
77 *Id.* at 10; MCI Petition against SWB Tr. 2149 at 10-11.
78 MCI Petition Against Tr. 2149 at 3-9.
79 SWB Reply to Petitions Against Tr. 2148 at 2-5; SWB Reply to Petitions Against Tr. 2149 at 8-9.
80 SWB Reply to Petitions Against SWB Tr. 2149 at 6-7.
81 *Id.* at 9.
82 SWB Reply to Petitions Against Tr. 2149 at 8.
83 SWB Reply to Petitions Against Tr. 2149 at 4-8.
84 MCI Petition Against United Tr. 287 at 5-8.
85 *Id.* at 7.
86 *Id.* at 7.
87 MCI Petition Against United Tr. 287 at 2-5.
88 United Reply to Petition Against United Tr. 287 at 5-8.
89 *Id.* at 8.

are overstated. [90] United also claims that MCI's contentions concerning the terms and conditions proposed by United for LIDB access service are baseless.[91]

9. US West

50. On November 12, 1991, Allnet, MCI, and Sprint each filed petitions to reject or to suspend and investigate US West Transmittal 203. US West filed one reply to all three petitions on November 22, 1991.

51. Allnet, MCI, and Sprint argue that the cost support for US West Transmittal No. 203 is insufficient and claim that the rates are unreasonably high.[92] MCI charges that it is unclear whether US West's filing includes only interstate costs.[93] Allnet and Sprint claim that US West's loading factors are unsupported and unreasonable and protest that the requirement that all carriers purchase a DS1 facility to access LIDB is unreasonable.[94] Allnet complains that US West uses questionable demand forecasts for LIDB validation.[95] MCI also alleges that the terms and conditions in US West's tariff are unreasonably vague.[96]

52. US West replies that the cost support for LIDB and common channel signaling access capability fully complies with the Commission's *Part 69 ONA Order*, and in response to MCI's allegation asserts that Transmittal 203 adheres to the Commission's separations rules.[97] US West also claims that its loading factors are reasonable and argues that the requirement of a DS1 facility is reasonable, particularly in light of network reliability concerns.[98] US West disputes MCI's contentions concerning the terms and conditions of Transmittal 203, claiming that MCI's allegations are unfounded and misleading.[99]

C. Discussion

53. We conclude, based on our review of the transmittals and the associated pleadings that these transmittals raise substantial questions of law and fact which require further investigation to determine whether the rate levels are excessive and whether the terms and conditions are reasonable. Therefore, because customers may be subject to excessive rates as a result these transmittals which may warrant refunds at the conclusion of this investigation, we will suspend all of the above-referenced transmittals for one day, impose an accounting order, and initiate an investigation. We will establish a pleading cycle and designate the specific issues to be examined in this investigation in a future Order.

IV. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED that the petitions for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific Bell Telephone Companies, United Telephone System, and US West, Inc., ARE GRANTED.

55. IT IS FURTHER ORDERED that the petitions to deny the above-referenced waiver petitions, filed by Allnet Communication Services, Inc., and US Sprint Communications Company Limited Partnership, ARE DENIED.

56. IT IS FURTHER ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by Ameritech Operating Companies in Tariff F.C.C. No. 2, Transmittal Nos. 574, 575, and 586, Bell Atlantic Telephone Companies in Tariff F.C.C. No. 1, Transmittal No. 476, BellSouth Telephone Companies in Tariff F.C.C. No. 4, Transmittal No. 439, GTE Telephone Operating Companies in Tariff F.C.C. No. 1, Transmittal Nos. 691 and 692, NYNEX Telephone Companies in Tariff F.C.C. No. 1, Transmittal Nos. 60, 61, 67, and 70, Pacific Bell Telephone Companies in Tariff F.C.C. No. 128, Transmittal Nos. 1557 and 1558, Southwestern Bell Telephone Company in Tariff F.C.C. No. 68, Transmittal Nos. 2148 and 2149, United Telephone System in Tariff F.C.C. No. 5, Transmittal No. 287, and US West, Inc., in Tariff F.C.C. No. 1, Transmittal Nos. 203 and 219.

57. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific Bell Telephone Companies, Southwestern Bell Telephone Company, United Telephone System, and US West, Inc., ARE SUSPENDED for one day.

58. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific Bell Telephone Companies, Southwestern Bell Telephone Company, United Telephone System, and US West, Inc., SHALL FILE tariff revisions reflecting this suspension no later than seven business days from the release of this Order. We hereby waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, and grant Special Permission No. 91-1126 for this purpose.

59. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific

---

[90] *Id.* at 6-8.
[91] *Id.* at 2-5.
[92] Allnet Petition Against US West Tr. 203 at 3-5; MCI Petition Against US West Tr. 203 at 12-15; Sprint Petition Against US West Tr. 203 at 3-7.
[93] MCI Petition Against US West Tr. 203 at 14-15.
[94] Allnet Petition Against US West Tr. 203 at 3-4; Sprint Petition Against US West Tr. 203 at 8-9.
[95] Allnet Petition Against US West Tr. 203 at 5-6.
[96] MCI Petition Against US West Tr. 203 at 3-8.
[97] US West Reply to Petitions Against US West Tr. 203 at 3-15.
[98] *Id.* at 4-6, 9-11.
[99] *Id.* at 15-22.

Bell Telephone Companies, Southwestern Bell Telephone Company, United Telephone System, and US West, Inc., SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

60. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation of the instant transmittals, filed by Allnet Communication Services, Inc., MCI Telecommunications Corporation, and US Sprint Communications Company Limited Partnership, ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-380

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 3509, 3513, 3561, 3571, and 3676

Revisions to Tariff F.C.C. No. 12

ORDER TO SHOW CAUSE

Adopted: December 31, 1991; Released: December 31, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. In CC Docket No. 90-132, the Commission prohibited AT&T from including any inbound service in Tariff 12 Options until 800 numbers become portable, but excepted from this general prohibition Tariff 12 options containing such service that were in effect or pending by September 1, 1991.[1] AT&T filed the transmittals captioned above to revise Tariff 12 Option 55, Option 18, the General Regulations for Tariff 12, the revisions in Transmittal No. 3509, and Option 27, respectively. All of these transmittals modify options which include inbound services. Moreover, the revisions captioned above appear to substantially change each of the subject options and thus be inconsistent with the Commission's decision in CC Docket 90-132 to except from the general prohibition on bundling only those options identified in its Orders.[2]

2. Therefore, AT&T is directed to file revisions to its Tariff F.C.C. No. 12, withdrawing the transmittals captioned above, or to file an Answer, showing cause why it should not be required to do so, no later than **January 9, 1992.** Interested parties may file oppositions to this Answer no later than **January 17, 1992.**

3. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554 and one copy shall be delivered to the Chief, Tariff Division, Common Carrier Bureau, 1919 M Street N.W., Washington, D.C. 20554. Pleadings must specify the docket number of this proceeding.

4. Accordingly, IT IS ORDERED, pursuant to Sections 403, 205(a), 4(i), 405, 213, 218 and 220 of the Communications Act, 47 U.S.C. §§ 403, 205(a), 4(i), 213, 218, 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701, that American Telephone and Telegraph Company, if it does not elect to file revised tariffs in accordance with the above discussion, is directed to SHOW CAUSE why Tariff F.C.C. No. 12, Transmittal Nos. 3509, 3513, 3561, 3571, and 3676 should not be found unlawful.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*); Memorandum Opinion and Order, FCC No. 91-930, Mimeo 38289 (released Nov. 25, 1991).

[2] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3706

Tariff F.C.C. No. 12

ORDER

Adopted: January 3, 1992; Released: January 3, 1992

By the Chief, Common Carrier Bureau:

1. On December 12, 1991 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective January 4, 1992 on 23 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined review procedures for certain tariff filings. This filing modifies Option 62 of Virtual Telecommunications Network Service (VTNS) by reducing the Basic Charge for Option 62 and by adding an International Volume Pricing Plan.

2. MCI Telecommunications Corporation filed a petition to reject the captioned tariff revisions and US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate Transmittal No. 3706 on December 19, 1991. AT&T filed a reply to these petitions on December 24, 1991.

3. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3706 and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 62, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket No. 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[2]

4. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3706, IS REJECTED.

5. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3706 filed by MCI Telecommunications Corporation, and the petition to reject or alternatively suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3706 filed by US Sprint Communications Company Limited Partnership ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-8 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are wavied.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, 6 FCC Rcd 5880 (1991) (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, FCC 91-390, Mimeo 38289, (released Nov. 25, 1991), *further recon. pending.*

[2] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (Com.Car.Bur.) (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3705
Tariff F.C.C. No. 12

ORDER

Adopted: January 3, 1992; Released: January 3, 1992

By the Chief, Common Carrier Bureau:

1. On December 12, 1991 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective January 4, 1992 on 23 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined review procedures for certain tariff filings. This filing modifies Option 58 of Virtual Telecommunications Network Service (VTNS) by establishing a non-recurring charge for customers who order Option 58 after January 1, 1992 and by removing a provision that provides for reimbursement of local exchange carrier change charges for customers that order after January 1, 1992.

2. MCI Telecommunications Corporation filed a petition to reject the captioned tariff revisions and US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate Transmittal No. 3705 on December 19, 1991. AT&T filed a reply to these petitions on December 24, 1991.

3. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3705 and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 58, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket No. 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[2]

4. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3705, IS REJECTED.

5. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3705 filed by MCI Telecommunications Corporation, and the petition to reject or alternatively suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3705 filed by US Sprint Communications Company Limited Partnership ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-7 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are wavied.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, 6 FCC Rcd 5880 (1991) (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, FCC 91-390, Mimeo 38289, (released Nov. 25, 1991), *further recon. pending.*

[2] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (Com.Car.Bur.) (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 3525 and 3571

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 3, 1992; Released: January 3, 1992

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3525 to modify Virtual Telecommunications Network Service (VTNS) Option 6. Specifically, this filing adds to Option 6 the ability to add 45 Mbps data transmission capabilities (DTCs) network components and measured ports. This transmittal also: modifies the service elements covered by the basic charge; introduces an international revenue stimulation plan; modifies the change provisions; modifies the outage credit units; and makes certain textual changes. AT&T Transmittal No. 3525 Description and Justification (D&J) at 2-5. Transmittal 3525 is scheduled to take effect on January 5, 1992. On October 21, 1991 AT&T filed Transmittal No. 3571 to include modifications to Option 6 inadvertently omitted from Transmittal 3525.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3525, and US Sprint Communications Company Limited Partnership (Sprint), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal 3525 on October 21, 1991. AT&T filed a reply on November 4, 1991. MCI filed a petition to reject Transmittal 3571 and Comptel filed a petition to reject or suspend Transmittal 3571 on October 29, 1991. AT&T replied to those petitions on November 4, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 6. Petitioners argue that the Commission intended to "grandfather" only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 6, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 service bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; CompTel Petition at 1. Sprint alleges that these modifications expand the scope of 800 service bundling in Option 6 and should not be permitted. *See* Sprint Petition at 2-3.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3525 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material. CompTel Petition at 1. Sprint asserts that the changes in Transmittal 3525 are not being made to serve the current customer but to make this offering more attractive to other customers, thereby avoiding the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4. Sprint insists that if the Commission continues to permit AT&T to revise existing "grandfathered" options with an inbound component the grandfathering provision will be rendered "more loophole than rule." *Id.* at 3.

5. AT&T replies that this filing makes no fundamental change to Option 6; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3525 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2.

6. In response to the claim of Sprint that these revisions expand the scope of 800 service bundling, AT&T asserts that these modifications make no change to rate schedules D or E, which apply for inbound calling, or any other change that affects inbound capabilities. *Id.* at 4. AT&T also argues that "grandfathering" involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 6 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

7. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 6 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

8. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[2]

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5905-6 (1991), (*Interexchange Order*), *reconsidered in part*, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991), *petitions for further recon. pending.*

[2] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

9. The Common Carrier Bureau has reviewed AT&T Transmittals No. 3525 and 3571, the revisions, and the appropriate pleadings. We conclude that these transmittals must be rejected because these revisions substantially change Option 6, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[3]

10. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3525 and 3571, ARE REJECTED.

11. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3525, filed by MCI Telecommunications Corporation, the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3525, filed by US Sprint Communications Company Limited Partnership, and Competitive Telecommunications Association, the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3571, filed by MCI Telecommunications Corporation, and the petition to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 23, Transmittal No. 3571 filed by Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-6 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[3] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company
Revisions to Tariff F.C.C. No. 12

Transmittal No. 3492

ORDER

Adopted: January 8, 1992; Released: January 8, 1992

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3492 to modify Virtual Telecommunications Network Service (VTNS) Option 47. Option 47, as modified, is described by AT&T as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 47: modify the domestic usage volume pricing plan; increase the minimum annual charge; modify the installation charge waiver; add the ability to change 45 Mbps data transmission capability (DTC) network components and voice transmission capabilities (VTCs); modify outage credit units; revises the DTC volume pricing plan; and make certain textual changes. *See* AT&T Transmittal No. 3492 Description and Justification (D&J) at 2-5. Transmittal 3492 is scheduled to take effect on January 9, 1992.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject the transmittal, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate the transmittal on October 11, 1991. AT&T filed a reply on October 24, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132[1] prohibits the Commission from accepting the revisions to Option 47. In the *Interexchange Order*, the Commission determined that, pending 800 number portability, 800 or inbound services cannot be legally bundled with other services, but also "grandfathered" existing options. *Interexchange Order* at para. 149. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 3-4; Sprint Petition at 3-4; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 47, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 2; Williams Petition at 3; CompTel Petition at 2. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 47 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 4.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3492 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material changes in the option. CompTel Petition at 1. Sprint asserts that the changes in Transmittal 3492 are not being made to serve the current customer but to make this offering more attractive to other customers, and thereby to avoid the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4.

5. Williams argues that AT&T has failed to demonstrate that modified Option 47 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 8-14. Williams asserts that even if Option 47 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 12-14. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand*[2] and *Sea-Land*[3] decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 16-17. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 18.

6. AT&T replies that this filing makes no fundamental change to Option 47; the rate elements, rate structure, and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3492 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T asserts that the allegations of Williams and Sprint as to the nature and effect of the tariff revisions are "confused and factually incorrect." *Id.* at 6. AT&T claims that the increase in the number of measured ports in the revised demand projections merely shows the quantities of service elements the customer has already purchased. *Id.* at 7. AT&T also asserts that the change in discount levels was not filed to encourage inbound usage, but applies equally to all switched schedules for Option 47. *Id.* AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 47 is unlawfully discriminatory. *Id.* at 9. AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 9-10.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5905-06 (1991) (*Interexchange Order*), *reconsidered in part*, FCC No. 91-930, Mimeo 38289 (released Nov. 25, 1991), *petitions for further recon. pending.*

[2] *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990).

[3] *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984).

"grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[4]

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3492, the revisions, and the pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 47, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[5]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3492, IS REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3492, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3492, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-12 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[4] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289 (released Nov. 25, 1991).

[5] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 3, 1992

COMMENTS INVITED ON LUBBOCK AREA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Lubbock area (Region 52).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **February 14, 1992** and reply comments on or before **March 2, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-1 Lubbock-Public Safety Region 52.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re complaint of

The Arkansas AFL-CIO and
The Committee Against Amendment 2

against

Television Station KARK-TV,
Little Rock, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1991; Released: January 6, 1992

By the Commission: Commissioner Barrett dissenting and issuing a statement; Commissioner Duggan dissenting.

I. INTRODUCTION

1. This case arises from a November 2, 1990, complaint filed by the Arkansas AFL-CIO and the Committee Against Amendment 2 ("complainants") against station KARK-TV, Little Rock, Arkansas. Amendment 2, which related to Arkansas' usury limits, was an Arkansas ballot issue that was before the electorate in the November 6, 1990, elections. Complainants allege that the ballot issue was a highly controversial issue of public importance, and that KARK-TV, in light of its overall programming, failed to give the position of those opposed to the amendment adequate coverage as required by the fairness doctrine. They ask the Commission to: 1) rule that KARK-TV must comply with the fairness doctrine; 2) find that KARK-TV has not, in fact, complied with the fairness doctrine in its coverage of the Amendment 2 issue; and 3) rescind its previous ruling that the fairness doctrine is unconstitutional.

2. On November 14, 1990, KARK-TV responded, through counsel, to the complaint. KARK-TV stated that "[i]t is the position of the licensee that the fairness doctrine is not applicable in this situation and is unconstitutional in any event," citing our decision in *Syracuse Peace Council v. WTVH*, 2 FCC Rcd 5043 (1987), *aff'd., Syracuse Peace Council v. FCC* ("*Syracuse*") 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). In addition, KARK-TV asserted that it gave coverage to both sides of the Amendment 2 ballot issue, and did so in a "reasonable and good faith manner" in accordance with the obligations imposed by the fairness doctrine.

3. On February 26, 1991, the staff asked KARK-TV for additional comments on the complaint.[1] The station responded by letter dated March 14, 1991. On April 2, 1991, complainants replied to KARK-TV's response.

4. Although the parties disagree as to whether KARK-TV's coverage of the ballot issue was "reasonable," it is not necessary to reach that issue here. Any requirement that licensees provide balanced coverage of ballot issues is entirely derived from the fairness doctrine and our decision in *Syracuse* repealed the fairness doctrine. *Syracuse* thus governs the outcome of this case, and the licensee therefore had no obligation to provide any specified amount of coverage of the Amendment 2 ballot issue.

II. BACKGROUND

5. In 1987, the Commission, faced with a fairness doctrine complaint against Meredith Corporation, repealed the fairness doctrine. *Syracuse Peace Council v. WTVH, supra.* After an extensive inquiry, including comments from the public, we concluded that our enforcement of the fairness doctrine "contravenes the First Amendment and thereby disserves the public interest." 2 FCC Rcd at 5057. As a result, we further concluded that the Constitution barred us from enforcing the fairness doctrine against the licensee.

6. The Court of Appeals for the D.C. Circuit upheld the Commission on its public interest determination without reaching the constitutional question. *Syracuse,* 867 F.2d at 658-59. The court found that our determination that the fairness doctrine no longer served the public interest was neither arbitrary, capricious, nor an abuse of discretion. *Id.* at 669.

III. DISCUSSION

7. The fairness doctrine imposed upon broadcasters a two-pronged obligation. Broadcast licensees were required to provide coverage of controversial issues of public importance in their communities and to afford a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

8. In *Syracuse Peace Council v. WTVH,* we concluded that:

> [T]he fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.

2 FCC Rcd at 5052. Our conclusion that the doctrine no longer served the public interest was based, in large part, on two core findings in the 1985 *Fairness Report,* 102 FCC 2d 145 (1985): 1) that the doctrine often operated to chill broadcaster speech on controversial issues; and 2) that the

[1] On December 28, 1990, complainants filed a Petition for Review with the U.S. Court of Appeals for the Eighth Circuit, asserting that the Commission's failure to render a decision on its complaint before November 6, 1990, constituted unreasonable delay and failure to grant timely relief. The case is pending.

recent increases in the diversity of available media outlets, including broadcasting outlets, undercut the need for the doctrine. 2 FCC Rcd at 5049-53.

9. In *Syracuse,* we stated that the fairness doctrine's infirmity of impermissibly chilling and reducing the discussion of controversial issues was not limited to the facts of that particular case or that particular market, "but is an infirmity that goes to the very heart of enforcement of the fairness doctrine as a general matter." *Syracuse,* 2 FCC Rcd at 5047.

10. Ballot issues were at the core of the fairness doctrine because they are controversial issues of public importance in virtually every instance. "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue, absent unusual circumstances. ..."*King Broadcasting Co.,* 23 FCC 2d 41, 43 (Broadcast Bureau 1970). Although our decision in *Syracuse* did not deal with ballot issues expressly, we based our conclusions on the 1985 *Fairness Report.* In that *Report,* the Commission specifically referred to evidence of how the fairness doctrine chilled broadcasters' speech with respect to ballot issues. *Fairness Report,* 102 FCC 2d at 175-76. Thus, our decision in *Syracuse* to repeal the doctrine because of its chilling effect applies to the fairness doctrine's application to ballot issues as well. We have been presented with no convincing basis to reverse our decision in *Syracuse* and decline to do so.

11. In 1985, the Commission said that Section 315 was subject to varying interpretations as to whether the doctrine was codified. *Fairness Report, supra,* 102 FCC 2d at 227-46. We now have been convinced by the analysis in *TRAC v. FCC,* 801 F. 2d 501 (D.C. Cir. 1986), *rehearing en banc denied,* 806 F. 2d 1115 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 919 (1987), that Section 315 is clear on its face that the fairness doctrine is not codified. Nothing in the legislative history persuades us otherwise. On this basis, therefore, we decline to award the relief for which complainants argue.

12. Accordingly, IT IS ORDERED, THAT the complaint filed by the Arkansas AFL-CIO and the Committee Against Amendment 2 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: KARK-TV, Little Rock, AR: Fairness Doctrine Complaint

During both of my confirmation hearings, I made clear my opinion with respect to the Fairness Doctrine. I supported the doctrine at those times and I continue to believe in its policy objectives. While I do not intend to push for its readoption by this Commission, I must dissent to the determination not to apply the Fairness Doctrine principles to ballot issues. I understand the majority's reasoning that general elimination of the Fairness Doctrine in the *Syracuse Peace Council v. WTVH* case [1] also eliminated the Fairness Doctrine as it applies to ballot issues. I do not question their logic, but do disagree with the underlying premise that the Fairness Doctrine no longer serves the public interest.

I think it extremely important that the voting public be aware of all sides of controversial issues of public importance to the community. I support the Fairness Doctrine because it provides a mechanism to assure that more than one side of an issue is presented. In light of todays decision, I can only be hopeful that the majority of broadcasters will continue to recognize that a part of "good" journalism is the coverage of controversial issues of public importance and the presentation of contrasting viewpoints on such issues.

[1] *Syracuse Peace Council v. WTVH,* 2 FCC Rcd 5043 (1987), *aff'd, Syracuse Peace Council v. FCC,* 867 F.2d 654 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 717 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications Tariff F.C.C. No. 1 — Transmittal No. 199

ORDER

Adopted: December 20, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. US West Communications Inc. (US West) filed Transmittal No. 199 on October 4, 1991, to introduce charges applicable to interexchange carriers (IXCs) that submit unauthorized Primary Interexchange Carrier (PIC) changes to US West.

2. On October 21, 1991, MCI Telecommunications Corporation (MCI) filed a petition to reject, or alternately to suspend and investigate, Transmittal 199. US West replied to the petition on October 31, 1991.

3. MCI argues that US West's tariff language should be modified to reflect the tentative conclusions regarding PIC change verification contained in the Commission's *PIC Change NPRM*. [1] MCI Petition at 5-6. MCI then claims that allowing US West to seek rate increases on a cost recovery basis for a service (PIC change charge) excluded from price cap regulation allows US West to recover more than the overall cost it would have been entitled to recover if rates for all of its regulated services were governed by either rate of return or price cap regulation. *Id.* at 6-7. Finally, asserts MCI, US West has not provided sufficient cost information under Section 61.38(b) of the Commission's Rules, 47 C.F.R. § 61.38(b), to allow the Commission and interested parties to determine whether the tariff rate is justified. *Id.* at 8-9.

4. US West replies that it is not required to revise its tariff language to reflect the tentative conclusions regarding PIC change verification contained in the *PIC Change NPRM*. According to US West, the *PIC Change NPRM* is primarily aimed at protecting customers by minimizing the number of unauthorized PIC changes, not at determining how local exchange carriers (LECs) should bill IXCs for unauthorized changes. Furthermore, US West states that if the Commission adopts an order in CC Docket No. 91-64 which affects LEC procedures for verifying and billing for unauthorized PIC changes, it will modify its tariffs to comply with any such order. US West Reply at 3. US West then disputes MCI's claim that US West would recover more than 100 percent of its overall costs if it is allowed to recover its costs for a service excluded under price cap regulation. US West asserts that its unauthorized PIC change charges are based on cost and comply with the Commission's tariff review requirements. US West Reply at 4. US West also maintains that its cost information justifies its charges for unauthorized PIC changes. [2] *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed the US West transmittal and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate US West Communications Inc. Tariff F.C.C. No. 1, Transmittal No. 199, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*). On December 12, 1991, the Commission approved a *Report and Order* revising the verification procedures that IXCs must follow when submitting PIC change orders, generated by telemarketing, to LECs on behalf of customers. American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, FCC 91-398 (1991) (*PIC Change Order*).

[2] On November 20, 1991, US West filed a letter with the Commission providing additional cost information to support its proposed charges. Letter from J. Stahlhut, US West, to D. Searcy, Secretary, Federal Communications Commission, filed Nov. 20, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-326
MM Docket No. 89-327

In the Matter of

Amendment of Section 73.202(b),	RM-5138
Table of Allotments,	RM-6315
FM Broadcast Stations.	RM-6448
(Carolina Beach, Havelock, Hertford,	RM-6765
Jacksonville, Fair Bluff, Wilmington,	RM-6779
Shallotte and Longwood, North	RM-6782
Carolina, and Murrells Inlet,	RM-6836
Bucksport, Darlington, Loris, St.	RM-6840
Stephen, North Myrtle Beach,	RM-7304
Surfside Beach, Johnsonville,	RM-7305
Scranton, Kure Beach, Georgetown)	RM-7306
and Stallsville, South Carolina)[1]	RM-7307
	RM-7308

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 2, 1992; Released: January 15, 1992

By the Commission:

1. The Commission has before it a complex daisy chain of allotment proposals and counterproposals involving twenty communities in North and South Carolina. We ordered consolidation of these proposals and counterproposals by *Memorandum Opinion and Order* (MM Docket No. 84-231) (*"Consolidation Order"*), 5 FCC Rcd 931 (1990), *pet. for recon. pend., appeal dismissed sub nom. Marine Broadcasting Corporation v. FCC and United States*, No. 90-1124 (D.C. Cir. June 4, 1990). On March 14, 1990, the Commission released a public notice ("Public Notice") requesting comment on the proposals and counterproposals discussed in the *Consolidation Order*.[2] The Appendix sets forth a list of commenters.

BACKGROUND

2. On February 1, 1990, the Commission adopted the *Consolidation Order* in response to a decision of the United States Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989). The court, in response to an appeal filed by Marine and two other petitioners, rejected three policies adopted in the course of MM Docket No. 84-231,[3] including a "no substitutions" policy which prohibited allotment proposals involving channel substitutions of a Docket 84-231 allotment unless the petitioner demonstrated a compelling need for the substitution or Commission error.[4] Acting under the "no substitutions" policy, the Commission had previously rejected Marine's petition for rule making. Pursuant to the *Reeder* decision, the Commission issued the *Consolidation Order* stating that it would now consider Marine's petition for rule making.[5] While Marine's appeal was pending, a number of proposals and counterproposals were filed, creating a complex daisy chain of mutually exclusive proposals. In the *Consolidation Order*, the Commission determined that it would generally consolidate for consideration proposals filed after the initial comment date in Docket 84-231. Further, the Commission declined to consolidate new proposals with mutually exclusive proposals already subject to notice and comment or treated as counterproposals in another proceeding, since to do otherwise would obviate their cutoff protection.

3. Under these guidelines, the Commission consolidated for consideration four docketed proceedings. In two proceedings, MM Docket Nos. 86-65 and 88-194, the Commission had made or proposed allotments conditioned on the denial of Marine's proposal. In another two proceedings, MM Docket Nos. 89-326 and 89-327, the Commission proposed allotments which, as a result of the filing of counterproposals, became mutually exclusive with other proposals in the Marine daisy chain.

4. The Commission has carefully examined all pleadings filed in this proceeding. In addition, the Commission staff conducted extensive engineering analyses to determine whether the use of alternate channels would permit the accommodation of otherwise mutually exclusive proposals, and found that alternate channels are available for several of the proposals. We deal with the proposals as follows. We deny a proposal to allot a channel to Stallsville, South Carolina, on the grounds that Stallsville is not a community for allotment purposes. We also deny a proposal to allot a channel to Longwood, North Carolina, concluding that there is not a timely expression of interest in an allotment at the community. Next, we grant an uncontested request to upgrade an existing channel at Surfside Beach, South Carolina. Then, we examine the conflicting proposals to upgrade channels at Jacksonville, Havelock and Hertford, North Carolina. We determine that by the use of an alternate channel at Jacksonville, all

[1] The communities of Havelock, Hertford, Jacksonville, Fair Bluff, Wilmington, Murrells Inlet, Bucksport, Darlington, Loris, St. Stephen, North Myrtle Beach, Surfside Beach, Johnsonville, Scranton, Georgetown and Stallsville have been added to the caption of this proceeding. *See* Public Notice No. 1809 (March 14, 1990), *corrected* August 16, 1990.

[2] Because of the complexity of this proceeding, we deviated from our practice of permitting only reply comments in response to a public notice and allowed parties to submit pleadings responsive to the reply comments. We will refer to comments filed in response to the Public Notice as responsive comments, and to comments filed in reply to responsive comments as responsive reply comments.

[3] MM Docket No. 84-231 proposed the allotment of nearly seven hundred FM channels designed to use the additional spectrum made available by changes in the Commission's technical rules in BC Docket No. 80-90.

[4] *See Consolidation Order*, 5 FCC Rcd at 931.

[5] *Id.* at 932.

three communities can receive upgraded services. Conflicts between proposals to allot a first local FM transmission service to Carolina Beach, North Carolina, and to upgrade existing channels at Shallotte, North Carolina, are then explored. We determine that the public interest is best served by allotting a channel to Carolina Beach, upgrading one existing station at Shallotte, and allotting an additional channel to Shallotte to accommodate expressions of interest in serving that community. We then examine a proposal to allot a first local transmission service to Bucksport, South Carolina, and grant that proposal after determining that Bucksport is a community for allotment purposes. Finally, we examine the remaining daisy chain of proposals which requires a choice between allotting a fourth local transmission service to Georgetown, South Carolina, or granting upgrades to existing stations at North Myrtle Beach and Darlington, South Carolina. We determine that the public interest would best be served by the grant of upgrades at North Myrtle Beach and Darlington.

THE PROPOSALS

Stallsville, South Carolina (RM-6840)

5. We will deny the proposal to allot a channel to Stallsville on the grounds that Stallsville is not a community for allotment purposes.

6. *Comments.* RJM requested the allotment of Channel 292A to Stallsville as that community's first local transmission service. In responsive comments, RJM requests that the Commission alternatively allot Channel 292A to Ladson, South Carolina, as that community's first local service. Ladson is a Census Designated Place (CDP) with a population of 13,246 persons according to the *1990 Rand McNally Commercial Atlas and Marketing Guide ("1990 Commercial Atlas")*, whereas Stallsville's population is 300 persons. RJM notes that Channel 292A could be allotted to Ladson at the site proposed for Stallsville.

7. RCLP, licensee of Station WDAR-FM (formerly WMWG-FM), Channel 288A, Darlington, South Carolina, and proponent of the Darlington channel substitution, suggests that Channel 292A could be allotted to Stallsville with a site restriction, thereby eliminating a conflict between Stallsville and Ogden's proposal to substitute a channel at St. Stephen, if Stallsville is found to be a community for allotment purposes. In responsive reply comments, Ogden, proponent of the North Myrtle Beach, Loris and St. Stephen channel substitution proposal, supports RCLP's suggested solution.

8. In responsive reply comments, RJM argues that the Ladson proposal does not constitute a counterproposal because no site change is necessary for the channel, and therefore no other proposals would be precluded. RJM states that it accepts RCLP's proposed site restriction.

9. *Discussion.* We conclude that Stallsville is not a community for allotment purposes. The Commission defines a "community" as a geographically identifiable population grouping. Generally, if a population grouping is incorporated or listed in the United States Census, we will presume that the area is a community for allotment purposes. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 101. Stallsville is neither incorporated nor listed in the census reports. If an area is not incorporated or listed in the census, the proponent of the allotment must show the place to be a geographically identifiable population grouping. *Id.* RJM has submitted no such evidence. Therefore, we conclude that Stallsville does not constitute a community for allotment purposes, and we reject RJM's proposal to allot a channel to Stallsville.

10. We find that RJM's request to allot Channel 292A to Ladson is an untimely counterproposal. The Appendix to all allotment *Notices of Proposed Rule Making* states that counterproposals must be advanced in initial comments and cannot be advanced in reply comments, and indicates that untimely counterproposals will not be considered. RJM advanced the Ladson proposal in responsive comments, after the initial comment deadline in this proceeding. Therefore, we will not consider the Ladson proposal in this proceeding. However, because the actions taken in this proceeding do not preclude consideration of RJM's Ladson proposal, we direct the Commission's staff to initiate further proceedings proposing the allotment of Channel 292A to Ladson after this *Report and Order* becomes effective.

Longwood, North Carolina (RM-6779)

11. We will deny the proposal to allot a channel at Longwood, as there is not a timely expression of interest in an allotment at the community.

12. *Comments.* GSM proposed the allotment of Channel 235A to Longwood as that community's first local FM transmission service, and stated its intention to apply for the channel, if allotted. The Longwood *Notice* noted that Longwood is a town of 250 people, and requested GSM to present evidence that Longwood is a community for allotment purposes. In response, GSM claims that Longwood has a post office, churches and business establishments, and that Longwood's economy is based on agriculture and timber. GSM submits an article from a North Myrtle Beach, South Carolina, newspaper discussing Longwood's history. GSM argues that Longwood's population has grown, but that new population figures are unavailable until the release of the 1990 Census. [6]

13. Jennings, licensee of Station WDZD-FM, Channel 228A, Shallotte, North Carolina, opposes the Longwood allotment because it conflicts with the allotment of Channel 233C3 to Shallotte necessary to upgrade Jennings' station. Jennings argues that Longwood does not have a sufficient population to constitute a community, but suggests in the alternative that if Longwood is found to be a community, Channel 237A could be allotted to Longwood.

14. In responsive comments, GSM withdraws its expression of interest in the Longwood allotment. We accept GSM's withdrawal.[7]

15. In responsive reply comments, Longwood Broadcasting for the first time states its interest in applying for the Longwood allotment. Longwood Broadcasting argues

[6] GSM also filed untimely reply comments in response to the Longwood *Notice*. Because GSM fails to provide good cause for the late filing, we will not consider GSM's reply comments in this proceeding.

[7] Longwood Broadcasting moved to strike GSM's withdrawal, arguing that GSM's withdrawal constitutes a written *ex parte*

that its expression of interest should be recognized because Channel 237A could be allotted to Longwood without affecting any other proposal. Longwood Broadcasting cites a number of cases for the proposition that the Commission permits expressions of interest in reply comments when no prejudice to other parties is present.

16. Longwood Broadcasting also contends that our policy of refusing to accept late-filed expressions of interest in an allotment proceeding is inconsistent with Section 73.3525(b)(1) of the Commission's rules and Section 307(b) of the Communications Act, as amended.[8] Longwood Broadcasting notes that Commission rule 73.3525(b)(1) requires the Commission to provide the opportunity for another party to take the place of a party withdrawing its application for a facility in a comparative hearing in order to ensure that the community is not deprived of local service for failure to pursue an application. In this instance, Longwood Broadcasting argues, its expression of interest must be accepted in order to protect the potential provision of a first local service to Longwood.

17. Pro filed a motion to strike Longwood Broadcasting's expression of interest. Pro is the licensee of Station WZYZ-FM, Channel 265A, Fairmont, North Carolina, and the proponent of a proposal in MM Docket No. 90-32 to substitute Channel 265C2 for Channel 265A at Fairmont and modify its authorization for Station WZYZ-FM to specify the higher powered channel, and to substitute Channel 264A for Channel 265A at Andrews, South Carolina. and Channel 263A for Channel 264A at Charleston, South Carolina, to accommodate the Fairmont substitution. Pro notes that its proposal is mutually exclusive with a proposal in MM Docket No. 90-32 to allot Channel 264A to Little River, South Carolina. When GSM withdrew its expression of interest in the Longwood allotment, Pro proposed that Channel 237A could be allotted to Little River. This option was previously precluded by the proposed use of Channel 237A at Longwood. Pro argues that the precedent cited by Longwood Broadcasting is inapposite to the instant case. Pro claims that the Commission's Public Notice of March 14, 1990, only permitted the filing of pleadings addressing the proposals consolidated in MM Docket Nos. 89-326 and 89-327, and not additional expressions of interest. Pro argues that Longwood Broadcasting provides no explanation for why it failed to file its expression of interest in response to the Longwood *Notice*, released in 1989.[9] Finally, Pro argues that Commission rule 73.3525(b)(1) applies only to assignment proceedings and not in the rule making context. Pro claims that rules used in assignment proceedings have no application in the rule making context.

18. In response, Longwood Broadcasting argues that its expression of interest, while not timely filed in response to the Longwood *Notice*, should be accepted because it was timely filed in response to the Public Notice. Longwood Broadcasting also argues that the Longwood proposal would be uncontested, and therefore acceptable, if proposals in conflict are denied due to conflicts with other proposals in this proceeding. Longwood Broadcasting disputes Pro's arguments concerning Commission rule 73.3525(b)(1), arguing that the purpose of the rule is to permit the Commission to ensure the fair, efficient and equitable distribution of facilities pursuant to Section 307(b). It claims that since a Section 307(b) analysis generally takes place in the rule making context, Commission rule 73.3525 should apply to allotment proceedings as well.

19. In responsive comments, Beach argues that if Longwood Broadcasting's expression of interest is accepted, the Commission could allot Channel 237A to Longwood without precluding any other proposal. Jennings notes in responsive reply comments that it will withdraw its proposal to allot Channel 237A to Longwood if there is no expression of interest in the channel.

---

contact because GSM failed to submit a certificate of service pursuant to Section 1.420(c) of the Commission's rules. GSM maintains that a petitioner need not serve a withdrawal on other parties, and argues that the withdrawal would not constitute an *ex parte* contact because it does not make a presentation on the merits. GSM notes that its withdrawal was served on other parties as an attachment to the filing of two parties in MM Docket No. 90-32. In response, Longwood Broadcasting argues that GSM's procedural defect cannot be cured by the attachment of its statement on other parties' pleadings.

We will not dismiss GSM's withdrawal. Dismissal of an *ex parte* pleading is a measure designed to create a disincentive for the filing party to submit such pleadings since the pleading is not considered in the proceeding, and, therefore, the party's participation in the proceeding may be negated. In this instance, dismissal of GSM's withdrawal would be a meaningless gesture, for GSM is clearly no longer interested in the outcome of this proceeding. Furthermore, no parties will be prejudiced by consideration of GSM's pleading, as all parties to this proceeding were made aware of GSM's withdrawal.

[8] Commission rule 73.3525(b)(1) permits the withdrawal of competing applications which specify different communities prior to the Commission making a 307(b) determination as to which application would better serve the public interest. The rule states that if it is determined that the withdrawal would impede achievement of a fair, efficient and equitable distribution of radio service among the states and communities, the Commission can provide further opportunity for the filing of applications by other interested parties specifying the same facilities proposed in the withdrawn application. This section applies only in those circumstances in which applicants facing comparative consideration pursuant to Section 307(b) agree to procure the withdrawal of one of the competing applications.

[9] Pro alleges that Longwood Broadcasting may have filed its expression of interest in order to block Pro's proposal in MM Docket No. 90-32. Longwood Broadcasting denies Pro's allegations, and requests an inquiry to determine if Pro offered GSM consideration in excess of actual and legitimate expenses in exchange for GSM's withdrawal.

We will not further investigate the conduct of Pro or Longwood Broadcasting. Neither party has offered evidence which establishes a case of abuse. The mere fact that Longwood Broadcasting submitted a late-filed expression of interest does not indicate that it is attempting to interfere with Pro's proposal in MM Docket No. 90-32. Furthermore, the Commission's rules limiting the amount of consideration that can be paid for the withdrawal of a proposal were not in effect at the time of GSM's withdrawal. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuse of the Commission's Processes*, 5 FCC Rcd 3911 (1990), *pet. for recon. denied*, 6 FCC Rcd 3380 (1991).

20. *Discussion.* We conclude that there is not a timely expression of interest in an allotment at Longwood. The Commission generally requires parties to file expressions of interest in an allotment before the expiration of the initial comment date. We have stated:

> Although the Commission does not require that every potential applicant for a channel participate in the allotment process, failure to participate places potential applicants at risk that no party will file a timely expression of interest or that a party may withdraw its expression of interest. Acceptance of late-filed comments supporting an allotment proposal is limited to situations where there is no opposition to the proposal and where there would be no adverse impact on another pending proposal.

Memorandum Opinion and Order (*Moscow, Ohio; Paris, et al., Kentucky*), 5 FCC Rcd 927 (1990). In *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990), the court affirmed the Commission's refusal to consider an untimely filed expression of interest in an allotment where acceptance would cause an adverse impact on a pending proposal. The court acknowledged that the Commission's refusal to accept the late filing resulted in the denial of a first local service to the community, noting, "However, while provision of first local service is a Commission priority [citation omitted], it cannot be sought at the expense of all procedural requirements." 918 F.2d at 963. The deadline for expressions of interest in the Longwood proposal was September 25, 1989, the cut-off established in the Longwood *Notice* for initial comments. Longwood Broadcasting did not file its expression of interest until April 13, 1990.[10] Longwood Broadcasting offers no explanation as to why it was unable to timely file an expression of interest. Second, with respect to Longwood's claim that its expression of interest should be accepted because its proposal is, for all practical purposes, uncontested, a Commission staff engineering analysis confirms that Channel 237A could be allotted to Longwood without precluding any proposals in this proceeding. However, the allotment of either Channel 235A or Channel 237A to Longwood could have precluded consideration of Pro's timely filed counterproposal in MM Docket 90-32. We note that the filing deadline for initial comments in MM Docket 90-32 was March 29, 1990, well before Longwood Broadcasting filed its expression of interest in the Longwood allotment. Accordingly, because acceptance of Longwood Broadcasting's late-filed expression of interest would prejudice proposals timely filed in MM Docket No. 90-32, we consider Longwood Broadcasting's late-filed expression of interest contested and, therefore, unacceptable in this proceeding. Our action declining to allot a channel to Longwood removes potential conflicts with the Loris substitution necessary to accommodate Ogden's proposed upgrade of its North Myrtle Beach station and Jennings' counterproposal to substitute Channel 233C3 for Channel 228A at Shallotte.

21. Commission rule 73.3525 does not pertain to this proceeding. This rule, by its terms, applies to assignment proceedings and not to allotment proceedings. In fact, the rule in FM allotment proceedings is that, absent a timely expression of interest in use of the channel, the channel will not be allotted and the proceeding will be dismissed. *See Amor Family Broadcasting Group, supra.* Indeed, nearly ten years ago, we rejected the type of delayed participation supported by Longwood Broadcasting. In BC Docket No. 80-130, the Commission considered, and ultimately rejected, adoption of a procedure in which the Commission would consider the preclusive effects of a proposed allotment and, if preclusion was significant, would provide a time period for interested parties in affected communities to express interest in having the channel allotted to the precluded community. The Commission determined that such a process would be of little practical value and "could raise the possibility of obstructionist tactics." *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 94-95.[11]

Surfside Beach, Johnsonville, and Scranton, South Carolina (RM-6448)

22. Jones, licensee of Station WYAK(FM), Channel 276A, Surfside Beach, requests the substitution of Channel 276C2 for Channel 276A at Surfside Beach, the modification of its license for Station WYAK(FM) accordingly, and, to accommodate the Surfside Beach upgrade, the substitutions of Channel 300A for Channel 286A at Johnsonville and Channel 286A for Channel 275A at Scranton. In responsive and responsive reply comments, Jones states that although it prefers a Class C2 channel, it will accept the substitution of Channel 276C3 for Channel 276A at Surfside Beach. A Class C3 channel would not require channel substitutions at Johnsonville or Scranton and, therefore, would not be mutually exclusive with any other proposal.

23. An engineering analysis confirms that Channel 276C3 can be substituted for Channel 276A at Surfside Beach.[12] We believe the public interest would be served by the substitution of Channel 276C3 for Channel 276A at Surfside Beach, and the modification of the license of Station WYAK(FM) accordingly, in order to provide that

---

[10] Contrary to Longwood Broadcasting's claims, the Public Notice did not reopen a period for interested parties to submit additional expressions of interest. Instead, it provided a time period for the filing of pleadings addressing the counterproposals and responsive pleadings. *See Consolidation Order*, 5 FCC Rcd 931 at n. 12.

[11] Even if Commission rule 73.3525(b)(1) were applied to this proceeding, we could not determine whether withdrawal of GSM's expression of interest in the Longwood allotment would unduly impede achievement of a fair, efficient, and equitable distribution of radio service, without further notice and comment proceedings. The termination of MM Docket No. 90-32 in *Report and Order* (*Fairmont, North Carolina, Andrews et al., South Carolina*), 6 FCC Rcd 4285 (All. Br. 1991), however, permits consideration of the Longwood proposal. In that proceeding, the Commission staff granted Pro's request to upgrade its facility at Fairmont, North Carolina, and to substitute channels at Andrews and Charleston to accommodate the upgrade. In addition, the staff dismissed a conflicting proposal to allot a channel to Little River, South Carolina. Therefore, consideration of the Longwood proposal has not been precluded. Accordingly, we direct the staff to initiate further proceedings seeking comments on the allotment of Channel 235A to Longwood.

[12] Coordinates for Channel 276C3 at Surfside Beach are 33-43-00 and 78-52-00, with a site restriction of 15.8 kilometers (9.8 miles) northeast to avoid a short-spacing to Station WSQN's construction permit (BMPH-901214IB), Channel 275A, Scranton, South Carolina. Because the petition which resulted

community with a wide area FM service. Therefore, we will grant Jones' petition as modified. This removes any conflict between Jones' proposal and the Bucksport proposal, and Jones' proposal and the Murrells Inlet substitution.

Jacksonville, Fair Bluff, Wilmington, Havelock and Hertford, North Carolina (RM-5138, RM-6315 and RM-7304)

24. We now examine conflicting proposals to upgrade existing stations at Jacksonville, Havelock and Hertford. A Commission staff engineering analysis has confirmed that through the use of an alternate channel at Jacksonville, which is available due to a channel substitution at North Myrtle Beach, South Carolina, we can accommodate the three proposals without the necessity of comparatively considering the merits of each.

25. Marine, licensee of Station WXQR-FM, Channel 288A, Jacksonville, North Carolina, requests the substitution of Channel 287C2 for Channel 288A at Jacksonville and the modification of its license for Station WXQR-FM accordingly, and the substitutions of Channel 299A for Channel 287A at Fair Bluff, North Carolina, and Channel 283A for Channel 287A at Wilmington, North Carolina, to accommodate the Jacksonville substitution. Three timely petitions for rule making conflict with Marine's petition. First, G&M filed a petition for rule making proposing the allotment of Channel 300C2 to Bucksport, South Carolina, as that community's first local transmission service. The Bucksport proposal is mutually exclusive with the Fair Bluff component of Marine's proposal. Second, Musicradio, licensee of Station WMSQ(FM), Channel 285A, Havelock, North Carolina, filed a petition for rule making proposing the substitution of Channel 286C2 for Channel 285A at Havelock and the modification of its license accordingly. The Havelock upgrade is mutually exclusive with the Jacksonville upgrade. Third, Maranatha, permittee of Station WKJE(FM), Channel 285A, Hertford, North Carolina, requests the substitution of Channel 285C2 for Channel 285A at Hertford and the modification of its permit accordingly. The Hertford upgrade can be achieved only if the Havelock substitution is granted.[13]

26. *Comments.* In its responsive comments, Maranatha argues that the Commission could sever the Marine, Maranatha and Musicradio proposals from the rest of the proceeding by using the original site coordinates proposed by G&M for the Bucksport allotment. Use of these coordinates would remove the conflict between the Fair Bluff and Bucksport proposals, which, in turn, would sever the Marine, Maranatha, and Musicradio proposals from the rest of the daisy chain. In responsive reply comments, Maranatha argues that if the Commission performs a comparative analysis of the Marine, Musicradio and Maranatha proposals, the Commission should grant the channel substitutions at Havelock and Hertford. Maranatha claims that adoption of the Havelock and Hertford channel upgrades will provide those communities with their first wide area FM services, whereas adoption of the Jacksonville proposal will provide that community with its third Class C2 or better allotment. Furthermore, claims Maranatha, if the Bucksport proposal remains mutually exclusive with the Fair Bluff substitution required for the Jacksonville upgrade, denial of Marine's proposal will permit the allotment of a first local service to Bucksport.

27. In responsive reply comments, G&M suggests allotting Channel 288C2 to Jacksonville instead of Channel 287C2. According to G&M, allotment of Channel 288C2 would eliminate the need to substitute a channel at Fair Bluff, thereby removing the conflict between that aspect of Marine's proposal and G&M's Bucksport proposal. Furthermore, claims G&M, this plan would permit adoption of the Musicradio and Maranatha proposals.

28. *Discussion.* A Commission staff engineering analysis indicates that Channel 288C2 can be allotted to Jacksonville with a site restriction[14] if Channel 283A is substituted

---

in the allotment of Channel 276C3 at Surfside Beach was filed prior to October 2, 1989, Jones may avail itself of the provisions of Section 73.213(c)(1) with respect to the allotment coordinates for Channel 275A at Scranton. Section 73.213(c)(1) permits the acceptance of applications which specify the minimum distance separation requirements in existence prior to the increase in power for Class A stations to 6 kW, where the channel was also allotted under the same mileage separation requirements.

[13] Musicradio's proposal was the subject of a *Notice of Proposed Rule Making*, 51 Fed. Reg. 6767 (All. Br. 1986), and granted in *Report and Order*, 2 FCC Rcd 3319 (All. Br. 1987), in MM Docket No. 86-65, but conditioned upon the outcome of Marine's appeal in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989). The Hertford proposal was the subject of a *Notice of Proposed Rule Making*, 3 FCC Rcd 2695 (Pol. and Rules Div. 1988), in MM Docket No. 88-194. Both proceedings were vacated in the *Consolidation Order* (MM Docket No. 84-231), 5 FCC Rcd 931 (1990).

Marine offered a timely counterproposal in MM Docket No. 86-65, suggesting that the Commission substitute Channel 262C2 at Havelock rather than Channel 286C2. Musicradio opposed this counterproposal and it was therefore rejected in the *Report and Order*. In their respective comments, Marine, Maranatha and Musicradio urge reconsideration of this counterproposal. Roy R. Grant, Jr. ("Grant"), proponent of a counterproposal in MM Docket No. 88-40 that is mutually exclusive with the allotment of Channel 262C2 at Havelock, opposes consideration of the counterproposal.

While adoption of this counterproposal could result in the accommodation of the Marine, Maranatha and Musicradio proposals, the Marine proposal would remain mutually exclusive with G&M's proposal to allot a channel to Bucksport, South Carolina. As shown *infra*, we can accommodate the interests of Marine, Musicradio and Maranatha, and remove the conflict between the Marine and G&M proposals by using an alternative arrangement of allotments. Therefore, we will not consider the substitution of Channel 262C2 at Havelock.

Maranatha and Musicradio also filed petitions for reconsideration of the *Consolidation Order*. The resolution of this proceeding renders these pleadings moot, and they are hereby dismissed.

[14] Under the mileage separation rules adopted in MM Docket No. 88-375, Channel 288C2 can be allotted to Jacksonville at site coordinates of 34-31-45 and 77-27-49, with a site restriction of 24.5 kilometers (15.2 miles) south to avoid a short-spacing to a construction permit for Station WRSF-FM, Channel 289C, Columbia, North Carolina, and a construction permit for Station WGQR-FM, Channel 289A, Elizabethtown, North Carolina.

for Channel 287A at Wilmington,[15] and if a channel is substituted for Channel 288A at North Myrtle Beach. As described *infra*, we will grant Ogden Broadcasting's request to substitute Channel 290C3 for Channel 288A at North Myrtle Beach. The allotment of Channel 288C2 to Jacksonville does not require the substitution of Channel 299A for Channel 287A at Fair Bluff, thereby removing any conflict between Marine's proposal and the Bucksport proposal. Furthermore, the substitution of Channel 288C2 for Channel 288A at Jacksonville will permit the substitutions of Channel 286C2 for Channel 285A at Havelock and Channel 285C2 for Channel 285A at Hertford.[16] We believe that the public interest would be served by the requested substitutions at Havelock, Hertford and Jacksonville in order to provide each community with a wide-area FM transmission service. Therefore, we will adopt the proposals of Marine, Maranatha, and Musicradio, and modify the authorizations for Stations WXQR-FM, WKJE(FM), and WMSQ(FM), respectively, to reflect the modifications. This action removes one of two conflicts with the Bucksport proposal, discussed *infra*.

Carolina Beach, Kure Beach, and Shallotte, North Carolina (RM-6765, RM-6782 and RM-7308)

29. The next daisy chain concerns conflicting proposals to allot a new channel to Carolina Beach and to upgrade existing channels at Shallotte. We believe the public interest is best served by the allotment of a channel to Carolina Beach, the upgrading of a channel at Shallotte, and the allotment of an additional, equivalent class channel at Shallotte to accommodate additional expressions of interest for a channel at the community.

30. *Comments*. Spoeri, licensee of Station WCCA-FM, Shallotte, requests the substitution of Channel 252A for Channel 292A at Shallotte, the modification of its license for Station WCCA-FM accordingly, and the allotment of Channel 292A to Carolina Beach as that community's first local FM transmission service. Spoeri argues that the Shallotte substitution is necessary because its station and Station WSYN-FM, Channel 293C2, Georgetown, South Carolina, suffer from mutual interference caused by propagation anomalies resulting from the stations' locations along the Atlantic coast. Spoeri claims that the Shallotte substitution will eliminate the interference. Hendrix Broadcasting, the sole proponent of the proposal to allot Channel 294A to Kure Beach, North Carolina, has withdrawn its expression of interest in the allotment. [17]

31. Jennings filed a timely counterproposal in response to the *Notice* setting forth Spoeri's proposal. Jennings proposes the substitution of Channel 233C3 for Channel 228A at Shallotte and the modification of its license for Station WDZD-FM accordingly, the allotment of Channel 252C3 to Shallotte to provide an equivalent class channel to accommodate any expressions of interest in the nonadjacent channel upgrade, and the substitution of Channel 300A for Channel 233A at Murrells Inlet, South Carolina, to accommodate the Shallotte Channel 233C3 substitution. [18] Jennings claims that its proposal would permit the allotment of Channel 292A to Carolina Beach, but would be mutually exclusive with Spoeri's request to substitute Channel 252A for Channel 292A at Shallotte. Jennings argues that its counterproposal is superior to Spoeri's proposal because its counterproposal would result in two Class C3 stations in Shallotte, whereas Spoeri's proposal would result in the continued operation of two Class A facilities in Shallotte. Furthermore, argues Jennings, Channel 279A could be substituted for Channel 292A at Shallotte instead of Channel 252A, thereby permitting adoption of Jennings' counterproposal. The Murrells Inlet substitution is mutually exclusive with the proposal of G&M to allot Channel 300C2 to Bucksport.

32. Spoeri replied, arguing that Jennings' counterproposal would not permit the allotment of Channel 292A to Carolina Beach, because the allotment would be short-spaced to Channel 292A at Shallotte.[19] In its reply, Jennings argues that its counterproposal is superior to Spoeri's proposal because it would enable Station WDZD-FM to expand its population coverage by 246.8% and its geographic coverage area by 266.8%.

---

[15] Site coordinates for Channel 283A in Wilmington are 34-16-15 and 77-57-23, which are the coordinates specified in the construction permit (BPH-880602NF) awarded to Beatriz Garcia Suarez de McCommas. Because the petition which resulted in the allotment of Channel 283A to Wilmington was filed prior to October 2, 1989, McCommas may avail herself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WCCG, Channel 283A, Hope Mill, North Carolina. Because the construction permit is conditioned on the outcome of this proceeding, Marine is not required to reimburse McCommas for the reasonable and prudent expenses incurred in substituting Channel 283A for Channel 287A. McCommas will be served with a copy of this *Report and Order*.

[16] This approach is preferable to allotting the Bucksport channel at coordinates different from those proposed by the Commission. Although using different coordinates may eliminate the mutual exclusivity between the Bucksport and Fair Bluff proposals, the Jacksonville and Havelock proposals would remain mutually exclusive.

Coordinates for Channel 286C2 at Havelock are 34-49-42 and 76-42-12, with a site restriction of 19 kilometers (11.8 miles) east to avoid a short-spacing to Station WDCG, Channel 286C, Durham, North Carolina. Coordinates for Channel 285C2 at Hertford are 36-08-42 and 76-28-20, with a site restriction of 5 kilometers (3.1 miles) south to avoid a short-spacing to Station WMXN, Channel 287B, Norfolk, Virginia.

[17] As no other expressions of interest for the Kure Beach channel have been filed, we will dismiss the Kure Beach proposal.

[18] Jennings' filed additional pleadings which include a supplement to its expression of interest filed September 4, 1990, a September 13, 1990, response to comments filed by Larry Neal Willis, and a November 6, 1990, supplement. We will not consider the September 4 or September 13, 1990, pleadings as they were filed after the comment period to the Public Notice. We will consider the November 6, 1990, pleading only to the extent that Jennings expresses its willingness to modify its license to specify one of the three available channels at Shallotte.

[19] Spoeri filed additional pleadings which include an opposition to comments of Jennings, filed November 9, 1990, supplemental comments and a motion to accept filed November 20, 1990, and reply to opposition to supplemental comments filed December 13, 1990. All of these pleadings were filed well after any comment period established by the Commission for any phase of the proceeding and, therefore, will not be considered. Accordingly, the opposition of Audrey R. Morris to Spoeri's November 20, 1990, supplemental comments and Jennings' reply to Spoeri's opposition are moot.

33. In responsive comments, Spoeri argues that Jennings' request to allot Channel 252C3 at Shallotte constitutes a contingent proposal, as the only event which could result in the allotment of that channel is another expression of interest in the Class C3 allotment at Shallotte. Spoeri argues that Jennings' counterproposal to substitute Channel 300A for Channel 233A at Murrells Inlet, in order to allot Channel 233C3 to Shallotte, precludes the allotment of Channel 300C2 to Bucksport and the allotment of Channel 252C3 to Shallotte would preclude allotment of Channel 292A to Carolina Beach, because the Carolina Beach allotment is contingent upon the substitution of Channel 252A for Channel 292A at Shallotte. Adoption of Jennings' counterproposal would result in the denial of two proposals to provide first local transmission service in order to accommodate an upgrade of an existing channel. Therefore, argues Spoeri, its proposal and G&M's proposal must be preferred over Jennings' counterproposal. In the event that the Commission adopts Jennings' counterproposal, Spoeri expresses its interest in the Class C3 allotment at Shallotte, and commits to apply for and then build a facility on the Class C3 channel if allotted.[20] Spoeri argues that if no other party expresses an interest in the Class C3 channel, then the Commission should modify Spoeri's authorization to specify operation on Channel 252C3.

34. In responsive comments, Jennings again maintains that its counterproposal is superior to Spoeri's proposal. Jennings contends that Spoeri has failed to justify the substitution of Channel 252A for Channel 292A at Shallotte to avoid interference, and submits an engineering statement arguing that Spoeri's claims of interference are unsupported. Jennings notes that Channel 279A is available instead of Channel 252A if the Commission approves a substitution at Shallotte. Jennings argues that even if Spoeri could demonstrate interference, the Commission's rules protect licensees and permittees from interference solely to the extent specified in the Commission's distance separation requirements and the rules governing maximum power and antenna heights. Furthermore, Jennings maintains that the Shallotte substitution requested by Spoeri is not necessary to accommodate a Carolina Beach allotment, because Channel 294A is available for allotment to that community.

35. In responsive comments, Spoeri notes that it is the only party to express an interest in a Class C3 allotment at Shallotte. Therefore, argues Spoeri, the Commission can modify Spoeri's authorization for Station WCCA-FM to specify Channel 252C3 at Shallotte, thereby making Channel 292A available at Carolina Beach. Furthermore, Spoeri argues, a modification to Channel 279A would limit Station WCCA-FM to a three kilowatt facility.[21]

36. Jennings disputes Spoeri's claim that its counterproposal is a contingent proposal. It argues that the counterproposal is not "invalid" because there was no interest in an additional Class C3 allotment in Shallotte when Jennings proposed the channel, as that channel was required in order to obtain a nonadjacent upgrade. Jennings argues that it selected Channel 252C3 as an alternate channel because it is the only available Class C3 channel in Shallotte, and not in order to create a conflict with Spoeri's proposal. Jennings argues that Spoeri is seeking a channel substitution in order to request an upgrade from Channel 252A to Channel 252C3. As evidence of this allegation, Jennings submits a copy of the asset purchase agreement between Beach and Spoeri in which the parties are obligated to take all steps reasonably necessary to upgrade Station WCCA-FM to Class C3 status. Jennings argues that the Commission cannot permit Spoeri to modify its channel to Channel 252C3 at this time, but must instead allot Channel 252C3 to Shallotte and accept competing applications for the channel. Finally, Jennings argues that Spoeri cannot now oppose the possibility that Channel 279A could be substituted for Channel 292A on the grounds that a station could not operate a six kilowatt facility on Channel 279A. Citing to *Memorandum Opinion and Order* (*Churubusco et al., Indiana*), 5 FCC Rcd 916 (1990), Jennings argues that it is incumbent upon a petitioner to raise potential class upgrade concerns before the deadline for initial comments in an allotment proceeding. Jennings notes that Spoeri had not stated a desire for a six kilowatt Class A facility until it submitted its responsive comments in this proceeding.

37. After the close of the comment cycle, the Commission staff noted that it had erred in issuing the Public Notice of March 14, 1990, announcing Jennings' counterproposal. The Public Notice failed to request additional expressions of interest in the allotment of Channel 252C3 at Shallotte, North Carolina, as required by the Commission's Rules. Accordingly, the Commission issued a corrected Public Notice on August 16, 1990, providing a period in which additional expressions of interest could be filed. In response to the corrected Public Notice, Larry Neal Willis ("Willis") filed an expression of interest, stating that he would apply for any Class C3 channel that may be allotted to Shallotte.[22] Jennings reiterates its expression of interest in either Channel 233C3 or Channel 252C3.[23] Spoeri also reiterates its expression of interest, but objects to the issuance of the corrected Public Notice. Spoeri argues that the March 14, 1990, Public Notice provided adequate notice of a possible Channel 252C3 allotment, and that no Commission rule or policy requires specific solicitation of expressions of interest. Therefore, Spoeri argues, he is the only party to have timely expressed an interest in the channel.

---

[20] Jennings' counterproposal was initially placed on public notice on March 14, 1990. Therefore, Spoeri's expression of interest in a Class C3 allotment at Shallotte, filed during the responsive reply comment period for Jennings' counterproposal, is timely. This is in contrast to Longwood Broadcasting's expression of interest in the Longwood allotment, which was untimely because it was not filed in response to the Longwood *Notice* released in 1989.

[21] Spoeri notes that it has filed an application to relocate Station WCCA-FM's transmitter site to permit operation of his station as a six kilowatt facility. *See* File No. BPH-8910021C.

[22] Willis argues that the Commission should have requested expressions of interest in Channel 233C3 as well as Channel 252C3, since Spoeri has already expressed an interest in Channel 252C3. We accept Willis' expression of interest to include any equivalent class channel that may ultimately be allotted to Shallotte.

[23] In a supplement filed on November 6, 1990, Jennings notes that Channel 279C3 may be available for allotment to Shallotte, and states that it would accept a modification to that channel as well.

38. *Discussion.* Spoeri incorrectly asserts that issuance of the corrected Public Notice was unnecessary. Changes to the FM Table of Allotments are governed by the rules concerning notice and comment rule making proceedings. Specifically, Section 1.413(c) requires that notice of the proposed rule change include a description of the subjects and issues involved. This is accomplished by the issuance of a Notice of Proposed Rule Making describing the proposed amendment and seeking public comment. One of the central issues involved in a nonadjacent channel upgrade is whether a timely filed competing expression of interest for use of the channel has been filed and, if so, whether the expression can be accommodated by the allotment of an additional equivalent class channel. Where the petition is the subject of a Notice of Proposed Rule Making, the *Notice* informs the public of the opportunity to file such competing expressions of interest as comments. However, when a party requests a nonadjacent upgrade in a counterproposal, rather than issuing a Further Notice of Proposed Rule Making to provide the opportunity to file competing expressions of interest, it is the Commission's practice to explicitly state in the Public Notice announcing the counterproposal that expressions of interest in that channel may be filed. This action provides notice to all interested persons of the availability of the channel. Without such a statement, the station could not be upgraded to the nonadjacent channel during the course of the rule making because adequate notice to the public of the opportunity to file competing expressions of interest would not be provided. Therefore, it was necessary for the Commission to issue the corrected Public Notice.

39. As a result of Willis' expression of interest in a Class C3 allotment at Shallotte, the Commission staff performed an engineering analysis to see if there was an additional Class C3 channel available for allotment to Shallotte. The analysis determined that Channels 233C3, 252C3, and 279C3 were potentially available for allotment to the community. Channel 233C3, however, requires the channel substitution at Murrells Inlet from Channel 233A to Channel 300A,[24] and this substitution would conflict with the proposed allotment of Channel 300C2 to Bucksport, South Carolina, as that community's first local FM service. A Commission engineering analysis indicates that there are no alternate Class C2 channels available for allotment to Bucksport and no substitute Class A channels available for Murrells Inlet. Therefore, it is necessary to comparatively consider the proposals. Under the Commission's FM allotment priorities,[25] first local service is of a higher priority than the provision of a third local service to a community. Therefore, we will allot Channel 300C2 to Bucksport, *infra,* and deny the proposal to allot Channel 233C3 to Shallotte by substituting Channel 300A for Channel 233A at Murrells Inlet.

40. Spoeri's request for a first local FM allotment at Carolina Beach can be accommodated by the allotment of Channel 294A in lieu of Channel 292A as originally proposed. We note that his request to substitute Channel 252A for Channel 292A at Shallotte is mutually exclusive with the allotment of Channel 252C3 to Shallotte. Although Spoeri claims that Station WCCA-FM receives interference from Station WSYN-FM, Channel 293C2, Georgetown, South Carolina, we find that he has failed to provide a sufficiently compelling showing demonstrating that Station WCCA-FM is suffering interference within its protected 60 dBu contour. Section 73.209 states that FM stations are entitled to interference protection limited solely to that which arises from compliance with the minimum distance separation and maximum power and antenna height requirements. We note that both Stations WSYN-FM and WCCA-FM are in compliance with the Commission's minimum distance and power limitation requirements. The Commission does not routinely substitute one channel for another of the same class to solve alleged interference problems, when that substitution must be made at the expense of a more highly valued use of the spectrum. *See San Clemente, California,* 50 FR 8226 (All. Br. 1985), *recon. den.,* Mimeo No. 6281, released August 13, 1986, *rev. den.,* 2 FCC Rcd 2514 (1987). With the denial of Spoeri's request to substitute Channel 252A for Channel 292A at Shallotte, we are also able to provide Shallotte with two wide coverage area FM services, one of which will provide a third local service to the community. We will allot Channel 252C3 to Shallotte[26] as an additional equivalent class channel in light of the expressions of interest submitted by Spoeri and Willis. We will not modify Spoeri's license for Station WCCA-FM to specify operation on Channel 252C3, as requested, because a third Class C3 channel to accommodate the interest expressed by Willis cannot be allotted to Shallotte in this proceeding. *See Vero Beach, Florida,* 4 FCC Rcd 2184 (1989) (where only one of two licensees can be modified to an upgraded channel, the first party to identify the candidate channel and request the upgrade is entitled to be the sole applicant for that channel).

41. We believe the public interest would be served by the allotment of Channel 294A to Carolina Beach as that community's first local transmission service.[27] We also believe the public interest would be served by the substitution of Channel 279C3 for Channel 228A at Shallotte.

---

[24] Spoeri filed a proposed resolution that would substitute Channel 262A instead of Channel 300A at Murrells Inlet by substituting Channel 234A for Channel 262A at Pawley's Island, South Carolina. This proposal is not acceptable for consideration in this proceeding because the inclusion of a new community makes this an untimely filed counterproposal. Spoeri may file a new petition for rule making requesting the necessary changes at Murrells Inlet and Pawley's Island to accommodate an additional Class C3 allotment at Shallotte.

[25] The FM allotment priorities are (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are of co-equal weight. *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 92 (1982).

[26] Site coordinates for Channel 252C3 at Shallotte are 33-55-49 and 78-11-54, with a site restriction of 17.6 kilometers (10.9 miles) east to avoid a short-spacing to the licensed site for Station WQSM-FM, Channel 251C1, Fayetteville, North Carolina.

[27] Coordinates for Channel 294A at Carolina Beach are 33-58-30 and 77-54-50, with a site restriction of 6.9 kilometers (4.3 miles) south to avoid a short-spacing to the licensed site of Station WSFL-FM, Channel 293C1, New Bern, North Carolina. Because the petition which resulted in the allotment of Channel 294A to Carolina Beach was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WSFL-FM, Channel 293C1, New Bern, North Carolina.

and the modification of the authorization of Station WDZD-FM accordingly, in order to provide Shallotte with a wide area FM service. [28]

Bucksport, South Carolina (RM-7307)

42. *Comments.* G&M submitted a petition to allot Channel 300C2 to Bucksport, South Carolina. G&M notes that the allotment would provide Bucksport with its first local transmission service.

43. Jennings argues that Bucksport is not a community, claiming that Bucksport lacks the relevant indicia of community status. Jennings submits a letter from a member of the Horry County Council, the county in which Bucksport is located, stating that Bucksport is a rural area with no local government and no social, civic or recreational groups. Bucksport, claims the letter, contains a marina and restaurant, a grocery store, two bars, and several churches. Although equipment for volunteer firefighters is maintained in the area, a caller must call a Conway, South Carolina, telephone number. On the other hand, Spoeri argues that Bucksport is a Census Designated Place and, therefore, constitutes a community for allotment purposes.

44. In its responsive comments, Jennings submits additional evidence that Bucksport is not a community. Jennings submits a declaration from Elbert Neal Herring, former chairman of the Myrtle Beach Planning and Zoning Commission, who claims that Bucksport is served by Horry County services, that it is represented by a council member on the Horry County Council, and has no governing bodies. Herring claims that the Bucksport area is a rural area that is frequented by persons involved in water sports and/or outdoor activities, and the area is populated by "persons involved in the service industry related to Bucksport's specialized economy or other areas of Horry County."

45. In responsive comments, G&M states its continuing interest in the Bucksport allotment. G&M notes that Bucksport is a Census Designated Place (CDP) with a 1980 population of 1,125 persons and an estimated 1990 population of 2,000 persons. Bucksport has its own post office, volunteer fire department, civic/community center, several churches, a private airport, and a water and sewage system. G&M disputes Jennings' responsive comments claiming that Bucksport is not a community, arguing that the author of the letter submitted by Jennings as evidence that Bucksport is not a community lives in a community approximately 30 miles from Bucksport. G&M also argues that the Commission has allotted channels to communities with populations less than that of Bucksport.

46. *Discussion.* We believe that Bucksport constitutes a community for allotment purposes. Bucksport is listed in the 1980 U.S. Census as a Census Designated Place (CDP) with a population of 1,125 people. Designation as a CDP is generally sufficient to establish community status. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 101 (1982). Bucksport has a post office, fire department, churches, and a community center, as well as several businesses. These factors provide further evidence of community status. *See Memorandum Opinion and Order (Semora, North Carolina),* 5 FCC Rcd at 935. Jennings fails to offer evidence sufficient to rebut a determination that Bucksport is a community. Even though Bucksport may lack a separate local government, an area need not exhibit each indicia of community status to be a community. *Id.* Therefore, we believe the public interest would be served by the allotment of Channel 300C2 to Bucksport as that community's first local transmission service.[29]

North Myrtle Beach, St. Stephen and Loris, South Carolina (RM-7305), Georgetown, South Carolina (RM-6836) and Darlington, South Carolina (RM-7306)

47. Finally, we turn to the remaining daisy chain of proposals. We must comparatively consider conflicting proposals to allot a channel to Georgetown, thereby providing that community with a fourth local transmission service, or to upgrade existing channels at North Myrtle Beach and Darlington. We determine that the public interest is better served by the upgrading of channels at North Myrtle Beach and Darlington, as this will provide a greater net reception service gain than would allotment of an additional service to Georgetown.

48. Three proposals remain in conflict. Ogden, licensee of Station WNMB(FM), Channel 288A, North Myrtle Beach, South Carolina, requests the substitution of Channel 290C3 for Channel 288A at North Myrtle Beach and the modification of its authorization accordingly. To accommodate the upgrade, Ogden requests the substitution of Channel 291A for Channel 290A at St. Stephen, South Carolina, and Channel 235A for Channel 290A at Loris, South Carolina. Ogden stated that it would reimburse the permittee for Channel 290A at St. Stephen for reasonable and necessary expenses related to the channel substitution, if adopted.[30] RJM requests the allotment of Channel 289A to Georgetown, South Carolina, as that community's fourth local transmission service. The Georgetown proposal is mutually exclusive with the North Myrtle Beach proposal. RCLP, licensee of Station WMWG-FM, Channel 288A, Darlington, South Carolina, requests the substitution of Channel 288C3 for Channel 288A at Darlington and the modification of its authorization accordingly. The Darlington proposal is mutually exclusive with Channel

[28] Coordinates for Channel 279C3 at Shallotte are 33-58-51 and 78-22-24, with a site restriction of 1.3 kilometers (0.8 miles) northeast to avoid a short-spacing to Station WYAV, Channel 281C1, Conway, South Carolina, and Station WZXS, Channel 280A, Topsail Beach, North Carolina. Because the petition which resulted in the allotment of Channel 279C3 was filed prior to October 2, 1989, Jennings may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to the reference coordinates for Channel 280A at Topsail Beach.

[29] Site coordinates for Channel 300C2 at Bucksport are 33-38-45 and 79-08-12, with a site restriction of 3.2 kilometers (2.0 miles) southwest to avoid a short-spacing to the licensed site for Station WNCT-FM, Channel 300C, Greenville, North Carolina.

[30] The Commission issued an *Order to Show Cause,* 5 FCC Rcd 5358 (1990), to George Wells, permittee of Station WTUA-FM, Channel 290A, St. Stephen, why his permit should not be modified to specify operation on Channel 291A. Wells filed no response to the *Order to Show Cause.* Therefore, consistent with Section 1.87 of the Commission's Rules, Wells is deemed to have consented to the proposed modification.

288A at North Myrtle Beach, and, therefore, is contingent upon the substitution of Channel 290C3 for Channel 288A at North Myrtle Beach.

49. *Comments.* In responsive comments, RJM notes that the Commission has released a *Notice of Proposed Rule Making* (MM Docket No. 89-496), 4 FCC Rcd 8117 (All. Br. 1989) proposing to reallot a channel from Georgetown to Myrtle Beach. RJM argues that in light of this proposal, the public interest would be served by allotting Channel 289A to Georgetown as a "replacement" channel.[31] RJM claims that the North Myrtle Beach and the Georgetown proposals must be decided under the Commission's fourth FM allotment priority of other public interest matters. Under such an analysis, argues RJM, the potential loss of diversification of local broadcast voices at Georgetown constitutes a greater public interest concern than an upgrade of an existing facility at North Myrtle Beach.

50. In responsive comments, RCLP argues that granting the North Myrtle Beach and Darlington upgrade proposals would be a more efficient use of the spectrum than allotting an additional service to Georgetown. RCLP states that if Channel 288C3 is substituted for Channel 288A at Darlington, it will file an application for a construction permit for the new channel on a timely basis.

51. Ogden submits responsive comments supporting its North Myrtle Beach proposal and RCLP's Darlington proposal. Ogden notes that the North Myrtle Beach and Darlington upgrades would provide expanded coverage for the only full-time stations in their respective communities of license, whereas RJM's proposal would result only in the allotment of an additional channel to Georgetown. Ogden argues that a comparison of area and population gains resulting from the proposed allotments indicates that the North Myrtle Beach and Darlington upgrades would provide additional service to 168,096 persons, whereas the Georgetown allotment would provide additional service to only 33,033 persons.

52. *Discussion.* The North Myrtle Beach, Darlington, and Georgetown proposals would not provide first or second reception service, or first local transmission service, to their respective proposed communities of license. Therefore, these proposals must be examined pursuant to the fourth FM allotment criteria of "other public interest matters." As commenters have noted, the North Myrtle Beach and Darlington proposals would permit an expansion of existing service, whereas the Georgetown proposal would provide a fourth local FM transmission service. In order to determine which proposal would best serve the public interest, we compare the extended service area of each proposed station. *See Memorandum Opinion and Order (Chippewa Falls, Wisconsin and Red Wing, Minnesota)* , 4 FCC Rcd 6323 (Pol. and Rules Div. 1989). The Commission staff performed an engineering analysis to determine the total gain area of each proposal. This analysis determined that a six kilowatt Class A channel at Georgetown would provide additional service to approximately 36,000 persons, whereas the substitution of Channel 290C3 for Channel 288A at North Myrtle Beach would provide additional service to 47,487 persons, or 24.2% more persons than the Georgetown allotment. The substitution of Channel 288C3 for Channel 288A at Darlington, which would be precluded by adoption of RJM's proposal, would provide additional service to 48,826 persons. Therefore, the net gain resulting from adoption of the North Myrtle Beach and Darlington proposals is 96,313 persons, approximately 267% greater than the gain that would result from adoption of the Georgetown proposal.[32] The Georgetown proposal, therefore, will be denied.

53. We believe the public interest would be served by the channel substitutions proposed at North Myrtle Beach and Darlington, as each substitution would provide a wide area service to the respective communities. Channel 290C3 can be substituted for Channel 288A at North Myrtle Beach,[33] and "Channel 288C3 can be substituted for Channel 288A at Darlington,[34] in compliance with the Commission's minimum distance separation rules. We will also substitute Channel 291A for Channel 290A at St. Stephen,[35] and Channel 235A for Channel 290A at Loris,[36] to accommodate the North Myrtle Beach substitution.

---

[31] This proposal has been dismissed. *See Report and Order* (MM Docket 89-496), 6 FCC Rcd 385 (All. Br. 1991). Therefore, RJM's proposal would not provide a "replacement" channel.

[32] Furthermore, adoption of the North Myrtle Beach proposal would permit the substitutions of Channel 288C2 for Channel 288A at Jacksonville, Channel 286C2 for Channel 285A at Havelock, and Channel 285C2 for Channel 285A at Hertford, as discussed *supra*. A Commission staff analysis indicates that the population gains resulting from these substitutions are 84,971 persons at Jacksonville, 43,982 persons at Havelock, and 68,466 persons at Hertford, or a total of 197,419 persons. Adding this total to the 96,313 person population gain increase in North Myrtle Beach and Darlington results in a total of 293,732 additional persons served by the five proposals that can be adopted if the Georgetown allotment is rejected.

[33] Site coordinates for Channel 290C3 at North Myrtle Beach are 33-50-00 and 78-45-39, with a site restriction of 7.2 kilometers (4.5 miles) west to avoid a short-spacing to Station WSYN-FM, Channel 293C2, Georgetown, South Carolina.

[34] Site coordinates for Channel 288C3 at Darlington. are 34-20-40 and 80-01-02, with a site restriction of 14.5 kilometers (9.0 miles) west to avoid a short-spacing to vacant but applied for Channel 287A, Fair Bluff, North Carolina, and the applications for that channel. Because the petition which resulted in the allotment of Channel 288C3 at Darlington was filed prior to October 2, 1989, RCLP will be permitted to avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WJYQ, Channel 288A, Moncks Corner, South Carolina, and to the allotment and pending applications for Channel 287A at Fair Bluff, North Carolina.

[35] Site coordinates for Channel 291A at St. Stephen are 33-29-36 and 79-53-21, the coordinates for the construction permit for Station WTUA-FM, Channel 290A, St. Stephen.

[36] Site coordinates for Channel 235A at Loris are 34-05-26 and 78-52-59, with a site restriction of 2.5 kilometers (1.5 miles) north to avoid a short-spacing to a construction permit for Station WSSX-FM, Channel 236C, Charleston, South Carolina. We note that after Ogden submitted its proposal, the Commission granted a construction permit to Robert L. Rabon ("Rabon") (BPH-870918MA) for Channel 290A at Loris contingent on the outcome of this proceeding. Because the construction permit is contingent on the outcome of this proceeding, Ogden is not required to reimburse Rabon for the reasonable and prudent expenses incurred in substituting Channel 235A for Channel 290A. Rabon will be served with a copy of this *Report and Order*.

ORDERING CLAUSES

54. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 2, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel Number
Carolina Beach, North Carolina	294A
Havelock, North Carolina	286C2
Hertford, North Carolina	285C2
Jacksonville, North Carolina	222C2, 254C1, 288C2
Shallotte, North Carolina	252C3, 279C3, 292A
Wilmington, North Carolina	247C, 267C2, 274C1, 283A
Bucksport, South Carolina	300C2
Darlington, South Carolina	288C3
Loris, South Carolina	235A
North Myrtle Beach, South Carolina	290C3
St. Stephen, South Carolina	291A
Surfside Beach, South Carolina	276C3

55. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Musicradio of North Carolina, Inc. for Station WMSQ(FM), Havelock, North Carolina, IS MODIFIED, to specify operation on Channel 286C2 in lieu of Channel 285A, the construction permit of Maranatha Broadcasting Company, Inc. for Station WKJE(FM), Hertford, North Carolina, IS MODIFIED to specify operation on channel 285C2 in lieu of Channel 285A, the license of Marine Broadcasting Company for Station WXQR-FM, Jacksonville, North Carolina, IS MODIFIED to specify operation on Channel 288C2 in lieu of Channel 288A, the license of Jennings Communications Corporation for Station WDZD-FM, Shallotte, North Carolina, IS MODIFIED to specify operation on Channel 279C3 in lieu of Channel 228A, the license of Radio Carolina Limited Partnership for Station WDAR-FM, Darlington, South Carolina, IS MODIFIED to specify operation on Channel 288C3 in lieu of Channel 288A, the license of Ogden Broadcasting of South Carolina, Inc. for Station WNMB(FM), North Myrtle Beach, South Carolina, IS MODIFIED to specify operation on Channel 290C3 in lieu of Channel 288A, the license of Jones, Eastern of the Grand Strand, Inc. for Station WYAK(FM), Surfside Beach, South Carolina, IS MODIFIED to specify operation on Channel 276C3 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date, the licensee/permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

56. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permits of Robert L. Rabon for Channel 290A, Loris, South Carolina, George Wells for Station WTUA-FM, St. Stephen, South Carolina, and Beatriz Garcia Suarez de McCommas for Channel 287A at Wilmington, North Carolina, ARE MODIFIED, to specify operation on Channel 235A in lieu of Channel 290A at Loris, Channel 291A in lieu of Channel 290A at St. Stephen, and Channel 283A in lieu of Channel 287A at Wilmington, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Rabon's construction permit, BPH-870918MA, Station WTUA-FM's construction permit, BPH-870918NC, or McCommas' construction permit (BPH-880602NF) except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permits BPH-870918MA, BPH-870918NC, and BPH-880602NF, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

57. The window period for filing applications for Channel 294A at Carolina Beach, North Carolina, Channel 254C3 at Shallotte, North Carolina, and Channel 300C2 at Bucksport, South Carolina, will open on **March 3, 1992** and close on **April 2, 1992.**

58. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the permittees for Channel 287A at Wilmington, North Carolina, and Channel 290A at Loris, South Carolina, as follows: Beatriz Garcia Suarez de McCommas, 2495 Greenwell Court, Wilmington, North Carolina 28403 (BPH-880602NF), and Robert L. Rabon, P. O. Box 437, Conway, South Carolina 29526 (BPH-870918MA).

59. IT IS FURTHER ORDERED, That the late filed expression of interest filed by Longwood Communications IS DISMISSED.

60. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 289A to Georgetown, South Carolina, filed by RJM Broadcasting (RM-6836), IS DENIED.

61. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 292A to Stallsville, South Carolina, filed by RJM Broadcasting (RM-6840), IS DENIED.

62. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 294A to Kure Beach, North Carolina filed by Hendrix Broadcasting (RM-6782), IS DISMISSED.

63. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 292A to Carolina Beach, North Carolina, and substitute Channel 252A for Channel 292A at Shallotte, North Carolina, filed by Beach Broadcasting of North Carolina, Inc. (RM-6765), IS GRANTED IN PART AND DENIED IN PART.

64. IT IS FURTHER ORDERED, That the Supplemental Comments of Muirfield Broadcasting, Inc. to allot Channel 288C3 to Jacksonville, North Carolina, IS DISMISSED.

65. IT IS FURTHER ORDERED, That the petitions for reconsideration of the Consolidation Order filed by Musicradio of North Carolina, Inc. and Maranatha Broadcasting Company, Inc., ARE DISMISSED.

66. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

67. For further information concerning this proceeding, contact Michael Ruger or Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parties filing pleadings in response to the Consolidation Order

Beach Broadcasting of North Carolina, Inc. and Todd Spoeri (Spoeri)

G&M Communications (G&M)

Great Southern Media (GSM)

Hendrix Broadcasting (Hendrix)

Jennings Communications Corporation (Jennings)

Jones, Eastern of the Grand Strand, Inc. (Jones)

Longwood Broadcasting

Maranatha Broadcasting Company, Inc. (Maranatha)

Marine Broadcasting Corporation (Marine)

Muirfield Broadcasting, Inc. (Muirfield)

Musicradio of North Carolina, Inc. (Musicradio)

Ogden Broadcasting of South Carolina, Inc. (Ogden)

Pro Media (Pro)

Radio Carolina Limited Partnership (RCLP)

RJM Broadcasting (RJM)

Larry Neal Willis (Willis)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEMPLETON, Inc. FOIA Control No. 91-71

On Request For Inspection of Records

Review of Freedom of Information Action

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1991; Released: January 10, 1992

By the Commission:

1. The Commission has under consideration an Application for Review filed on April 29, 1991, by Vivian E. Warner (Warner) and an opposition filed by Templeton, Inc. (Templeton). Warner seeks review of an April 15, 1991 decision by the Chief, Common Carrier Bureau, which granted Templeton's request pursuant to the Freedom of Information Act (FOIA) to inspect documents submitted to the Commission by Warner. For the reasons discussed below, we deny the application for review.

BACKGROUND

2. By letter dated February 27, 1991, the Chief, Mobile Services Division requested, pursuant to section 403 of the Communications Act, 47 U.S.C. §403, Warner to provide the Commission with a copy of the agreement settling litigation between Warner and American Cellular Services U.S. (ACS) involving ACS' application for the FCC authorization for the nonwireline cellular system in RSA 645, Tennessee 3, File No. 10763-CL-P-645-89. Warner was also asked to provide details of any and all consideration exchanged between Warner and ACS in connection with the settlement. In response, Warner submitted a copy of the agreement and an affidavit and requested that the documents be accorded confidential treatment.

3. By letter dated March 21, 1991, Templeton filed an FOIA request, seeking permission to inspect and copy these documents. Warner opposed the request on grounds that the documents fell within FOIA exemptions 4 and 7. The Bureau concluded the documents were not within either FOIA exemption and ordered disclosure.

DECISION

4. On appeal, Warner challenges the Bureau's determination that her submissions in response to the Commission's request are not within Exemption 4. Exemption 4 protects trade secrets and commercial or financial information which is privileged and confidential. 5 U.S.C.§552(b)(4). Information is "confidential" when disclosure is likely either (1) to impair the government's ability to obtain necessary information from outside sources or (2) cause the requester substantial competitive harm. *National Parks and Conservation Association v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974) (*National Parks I*). Warner claims that the Bureau erred when it determined that disclosure would not impair the Commission's ability to obtain necessary information from outside sources.[1] In this connection she argues that because the Bureau did not identify the reason for its request, the Bureau has no jurisdiction to investigate her settlement activities and thus that her submissions were made voluntarily. She further claims that documents are exempt from disclosure pursuant to the first prong of *National Parks I* because disclosure would discourage such voluntary submissions.

5. Warner's contentions in this regard are without merit. The submissions in question were not voluntary but were required both by the statute and Commission rules. Section 403 of the Communications Act, 47 U.S.C. §403, gives the Commission broad authority to conduct investigations pertaining to any matter within its statutory authority. This authority includes any examination of the qualifications of an applicant for Commission licenses.[2] The manner in which the Commission chooses to conduct its investigation, including the decision as to what information it wishes to disclose, is a matter within its discretion. *See Tidewater Radio Show, Inc.*, 46 RR 2d 1411, 1419 (1980). Therefore, merely because the Bureau did not disclose to Warner its purpose in seeking the information does not affect the Commission's section 403 authority.

6. Further, the Commission has both general and specific authority to require the submission of settlement agreements involving cellular RSA applicants. Section 308(b) of the Communications Act, 47 U.S.C. §308(b) authorizes the Commission to seek from any applicant or licensee "written statements of fact" that may be needed to determine whether the applicant's or licensee's applications should be granted or its licenses revoked. Moreover, section 22.13(c)(2) of the Commission's rules similarly provides that applicants must submit any additional information that the Commission requires to determine whether a radio authorization should be granted. 47 C.F.R. §22.13(c)(2). Finally, the rules provide that "failure to respond substantially within a specified time period to official correspondence or requests for additional information" will result in dismissal of a pending application. 47 C.F.R. §22.28(c). [3]

7. The above-cited sections grant the Commission unequivocal authority to require applicants like Warner to respond to its inquiries. It need not, therefore, rely on voluntary submissions.[4] We further believe that there are no other circumstances here to suggest that release of the material would impair the Commission's ability to require similar submissions in the future.[5] We therefore find no basis to disturb the Bureau's decision that Exemption 4's impairment prong is inapplicable to these documents.

8. We also conclude that the documents are not within Exemption 7 of the FOIA. Exemption 7 protects from disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure of the records or information could reasonably be expected to "interfere with enforcement proceedings." 5 U.S.C. §552 (b)(7)(A). Warner suggests that disclosure will impede the Bureau's investigation because she will be less willing in the future to supply information "voluntarily" to the Bureau.

9. For the reasons stated above, the submissions in question were not voluntary, and we have ample regulatory tools to obtain any necessary information. Accordingly, we reject Warner's claim that Exemption 7 applies.[6]

10. Accordingly, IT IS ORDERED, that the Application for Review filed by Vivian E. Warner, is DENIED. Warner will be acorded 10 working days from the release date of the Order in which to seek a judicial stay. *See* 47 C.F.R. §0.461(h)(4).

11. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Warner does not challenge the Bureau's determination that Warner provided inadequate support for her claim that the competitive harm prong of Exemption 4 applied to the documents. We therefore do not address that aspect of the Bureau's ruling.

[2] At the time Warner received the information request she was an applicant in numerous cellular markets and had numerous outstanding petitions for reconsideration of the dismissal of her applications in markets where she lost lotteries.

[3] We note that when the Commission eliminated the requirement that settlement agreements routinely be submitted to the Commission for approval, it did not indicate that matters relating to settlements were beyond the Commission's regulatory concern. On the contrary, the Commission specifically noted that it retained adequate tools to deal with abuses of the regulatory process. *Public Mobile Radio Services*, 95 FCC 2d 769, 796 (1984).

[4] Warner states that even if the Commission concluded that it had authority to secure the settlement agreement, the affidavit was provided voluntarily. Application for Review at 9. Warner's characterization is incorrect. The affidavit contained information concerning consideration received as part of the settlement and thus was directly responsive to the Bureau's request for information. Additionally, Warner maintains that she relied on staff assurances that the documents would be kept confidential. A staff determination that documents will be held in confidence does not preclude subsequent disclosure pursuant to an FOIA request. *See* 47 C.F.R. §§0.459(d),(h); §0.461(f)(3).

[5] Warner relies on several cases in which the Commission did not disclose information based on the impairment prong of Exemption 4. These cases are inapposite. Three of the four cited cases involved financial data submitted in conjunction with the Commission's audit process. The Commission determined that, although it has authority to require the submission of a wide range of information from the subject carriers, a cooperative atmosphere was critical to the success of the Commission's exercise. In support, the Commission noted that the requests in audit proceedings are typically open-ended thus permitting carriers to interpret broad information requests in a narrow and selective fashion. Additionally, many of the documents requested in an audit proceeding are generated in response to the request. *See David Stoner*, 5 FCC Rcd 6458 (1990); *Martha H. Platt*, 5 FCC Rcd 5742 (1990); *Western Union Telegraph* Company, 2 FCC Rcd 4485 (1987). In the fourth case cited by Warner, the Commission was concerned that compulsory submission would detrimentally delay international instructional processes. *See Pan American Satellite*, 4 FCC Rcd 4586 (1989). None of these concerns is present in the instant case. The materials in question were submitted in response to an explicit directive which specifically identified the documents sought.

[6] Warner also maintains that there is no public interest in disclosing the documents. Since we have concluded that the subject documents are not subject to an FOIA exemption, the FOIA requires disclosure, and no public interest analysis is required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3759

Tariff F.C.C. No. 12

ORDER

Adopted: January 8, 1992; Released: January 9, 1992

By the Chief, Common Carrier Bureau:

1. On December 27, 1991 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective January 10, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined review procedures for certain tariff filings. This filing modifies Option 88 of Virtual Telecommunications Network Service (VTNS) by waiving the installation charges for customers that elect an increase in the minimum annual charge to $500,000 within one year of substantially complete installation.

2. MCI Telecommunications Corporation and Williams Telecommunications Group filed petitions to reject the captioned tariff revisions, US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate, and the Competitive Telecommunications Association filed a petition to reject or, in the alternative, suspend and investigate Transmittal No. 3759 on January 3, 1992.

3. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3759 and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 88, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket No. 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[2]

4. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3759, IS REJECTED.

5. IT IS FURTHER ORDERED that the petitions to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3759 filed by MCI Telecommunications Corporation and Williams Telecommunications Group, the petition to reject or alternatively suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3759 filed by US Sprint Communications Company Limited Partnership, and the petition to reject or, in the alternative, suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3759 filed by the Competitive Telecommunications Association ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-14 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, 6 FCC Rcd 5880 (1991) (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, FCC 91-390, Mimeo 38289, (released Nov. 25, 1991), *further recon. pending*.

[2] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (Com.Car.Bur.) (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-337
Phase II

In the Matter of

Regulation of International
Accounting Rates

FIRST REPORT AND ORDER

Adopted: December 12, 1991; Released: December 23, 1991

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1 - 4
II. BACKGROUND	5 - 7
III. DISCUSSION	8 - 27
A. Public Benefits	11 - 16
B. One-Way Resale	17 - 20
C. Equivalent Resale Opportunities	21 - 22
D. Regulatory Treatment	23 - 26
1. U.S. Carrier Tariffs	23
2. Section 214 Certification	24
3. Reporting Requirements	25 - 26
IV. CONCLUSION	27
IV. ORDERING CLAUSES	28 - 33

Appendix A List of Commenting Parties
Appendix B Rules
Appendix C Procedural Matters

I. INTRODUCTION

1. By Further Notice of Proposed Rule Making in this proceeding, 6 FCC Rcd 3434 (1991), Phase II (Phase II Further Notice), we proposed a number of additional steps as part of our continuing regulatory oversight of international settlement arrangements and our goal of lower, more economically-efficient, cost-based accounting and collection rates for common carrier services to and from the United States. In this First Report and Order we shall address one of the proposals we there enumerated, the encouragement of resale of international common carrier services as a way to exert downward pressure on current, above-cost international accounting and collection rates.

2. More specifically, we asked for comment on two resale proposals. First, we asked whether we should now require, as a matter of U.S. law, unlimited resale for all U.S. carrier-provided international telecommunications services, including international private line service, for all countries.[1] Second, we sought comment on an alternative approach that would require U.S. carriers to permit unlimited resale of all international telecommunications services only to those countries, such as Canada, the United Kingdom, Sweden and Australia, that are in the process of implementing cost-based international accounting and collection rates and have more liberal telecommunications regimes, including permitting or requiring resale of international private line and international telephone services.[2]

3. We also sought comment on a proposal by American Telephone and Telegraph Company (AT&T) to amend Section 43.51 of the Commission's Rules and Regulations, 47 C.F.R. §43.51 (1991), to require U.S. common carriers to file not only their operating agreements with their correspondents but also all international private-line interconnection arrangements to which they are parties. [3]

4. We conclude that we should adopt our alternative resale proposal to require resale of U.S. international private line services on those routes where equivalent resale opportunities are provided to U.S.-based carriers.[4] We also conclude that we should amend Section 43.51 of our Rules and Regulations to require that carriers file with the Commission any agreement for the interconnection of private lines to the public switched network (PSN).[5]

II. BACKGROUND

5. In 1976 the Commission adopted a Report and Order in Docket No. 20097,[6] in which it found that the public interest would be served by a policy of allowing unlimited resale[7] of domestic common carrier telecommunications services and found unlawful the prohibitions against resale which most U.S. common carriers then included in their tariffs for private-line service. The Commission deferred the application of its resale and shared use policy to international common carrier services until a later proceeding and, in 1980, initiated CC Docket No. 80-176.[8] In 1982 AT&T amended its International Message Telephone Service (IMTS) tariff, and in 1984 its private-line tariff, to remove its prohibitions against resale upon the obtaining of any necessary operating agreements. Because these revisions gave users access to resellable international telephone service and private lines to most overseas points, and because, over time, most other carriers followed AT&T's lead, it was unnecessary to order the removal of resale prohibitions from all international tariffs. We note, however, that a few carriers still have resale prohibitions in their international tariffs.[9]

6. International resale has taken on a new prominence, both in connection with its potential utility in exerting downward pressure on above-cost accounting rates and as a result of the recent amendment of CCITT Recommendation D.1.[10] We observe that the British Embassy filed comments in this proceeding indicating that the UK government hopes that its willingness to license international resale would lead other countries to adopt similar poli-

cies. Further, we have before us a number of applications for Section 214 authorization to resell international private lines.[11] It was to explore these issues, and because we found the record in CC Docket No. 80-176 to be stale, that our Phase II Further Notice in this proceeding again sought comment on the resale issue.

7. In response to the Phase II Further Notice, we received comments and reply comments addressed to the resale issue from the National Telecommunications and Information Administration (NTIA), the National Association of Regulatory Utility Commissioners (NARUC), the British Embassy on behalf of the government of the United Kingdom, five U.S. international service providers,[12] Pan American Satellite (PAS), a U.S. international separate satellite provider, two European carriers,[13] Teleglobe Canada Inc. (Teleglobe), the Canadian international carrier and two user representatives.[14]

III. DISCUSSION

8. After reviewing the arguments of the parties we have concluded that the public interest in cost-based international telecommunications will be served by the adoption of policies that encourage resale of international telecommunications services. In the fifteen years since we ordered unlimited resale in our *Domestic Resale Decision*, resale has substantially increased competition in the U.S. domestic telecommunications market and has yielded public benefits in terms of increased demand and reduced prices for most telecommunications services, and has virtually eliminated the possibility of price discrimination. This Commission remains convinced that the extension of unlimited resale into the international telecommunications market would yield the same public benefits in that market. We also remain convinced that unlimited international resale would yield the additional public benefit of exerting pressure to reduce above-cost international accounting rates for switched services, including IMTS.[15] Finally, we believe that the leadership role provided by the CCITT through revised Recommendation D.1 will enhance our ability to achieve these public interest benefits.[16] Indeed, we are confident that Recommendation D.1 reflects a growing recognition on the part of the international community that international resale can drive international accounting and collection rates closer to cost.

9. However, because foreign governments and administrations generally control access to their end of the international circuit and can restrict access to or resale of telecommunications services, these entities have the power to frustrate a unilateral U.S. international resale policy, and more particularly, to discriminate against U.S. carriers and users in the authorization of international resale. As a result, we believe that we must condition our resale policy to protect the U.S. public interest. We shall therefore require U.S.-based carriers to permit resale of their international private-line services only to those countries that permit equivalent resale opportunities in the return direction.

10. Specifically, we will require an applicant seeking authorization under Section 214 of the Communications Act to resell international private lines to a particular country to demonstrate that the subject country affords resale opportunities equivalent to those available under U.S. law.[17] We shall also amend Section 43.51 of our Rules to require U.S. common carriers to file not only their operating agreements with their overseas correspondents but also any arrangement for the interconnection of private lines to the PSN.

A. Public Benefits

11. At the outset it is necessary to clarify that in this decision we address resale of international private lines for the provision of telecommunications services to third parties. We do not equate resale with the interconnection of private lines to the PSN. A user can connect a private line to the PSN, even at both ends of the international circuit, for its private communications without engaging in resale. Conversely, one can engage in resale without connecting the private line to the PSN. As a result, our conclusions in this decision do not alter our long-standing policy of allowing users to attach their private lines to the PSN for their private use.[18]

12. With respect to resale of international private lines for the provision of telecommunications services to third parties, a more liberal policy will allow new entities to enter the market to offer services such as IMTS and will compel carriers at both ends of the circuit to bring their prices to cost to avoid losing their current customers to resale providers. Those who take advantage of an offering by a reseller may benefit by obtaining telecommunications service at a price lower than that charged by the underlying carrier for the equivalent service.[19] The underlying carrier could also benefit from resale in that it will derive revenues from leasing private lines to resellers.

13. As the Commission noted in CC Docket 80-176, the existence of international resale will not necessarily harm underlying carriers. While it is true that resale could cause the IMTS customers of an underlying carrier to shift to the IMTS service of a reseller, the underlying carrier does not lose revenues to another carrier in a literal sense. Rather, it is a diversion of revenues from the underlying carriers' IMTS to the same carriers' private-line services (since the reselling entity would still lease its circuits from the underlying carrier). As a result, even if the underlying carrier made no attempt to compete with the reseller, its "lost" IMTS revenues would be at least partially offset by increases in private-line revenues.

14. If underlying carriers have properly priced their private lines and their IMTS, resale should have little deleterious effect on overall carrier revenues. Because these carriers use the same international cable and satellite facilities to provide both IMTS and private-line service, their transmission costs are essentially the same whether such circuits are used for private-line or IMTS service. Underlying carriers should be able to recover much of their cost of service (including a fair return on investment) whether they use the circuits for IMTS or private-line service.[20]

15. We do not, however, anticipate that underlying carriers would be content to replace their IMTS revenues with private-line revenues, but that they will attempt to retain their IMTS customers by, *inter alia*, reducing the charges for IMTS service. If an underlying carrier were to lower its collection rates to prevent diversion of its customers to a reseller, the underlying carrier might further reduce its gross revenues in the short run. It might be argued that such a reduction would harm the carriers by reducing their IMTS revenues without reducing their costs. Experience in the United States, however, has shown that such a reduction does not lead to reduced IMTS revenues but that the lower prices stimulate greater

use and lead to increased overall revenues.[21] We have also found that this increased traffic leads to more efficient use of transmission facilities and thus to lower unit costs.

16. An additional benefit of international resale is that it will exert a downward pressure on above-cost international accounting rates. If an underlying carrier begins to lose IMTS customers to resale carriers, it will not only receive fewer IMTS revenues, it will also have fewer IMTS minutes to report in the international settlements process. To the extent that the carrier is in a net deficit position because it originates more minutes outbound than it receives inbound, a diversion of outbound calls to a reseller would reduce the outbound surplus and lower the net settlements outpayment. For an underlying carrier that originates fewer minutes outbound than it receives inbound, and thus receives a settlements payment from its correspondent, a reduction in the outbound minutes it carries would increase the net settlements inpayment. However, the underlying carrier would also receive fewer revenues from its IMTS customers and, thus, would wind up with fewer revenues overall. To the extent that the accounting rate is above cost, the underlying carrier will face a constraint on how much of a reduction in its revenues it can tolerate.[22] The underlying carrier may be forced either to take a loss on the service or raise its IMTS collection rates. If the underlying carrier were to increase its collection rates, however, the diversion of IMTS customers to the reseller would increase. Faced with such a situation, the underlying carrier would appear to have little choice but to renegotiate the accounting rate downward.

B. One-way Resale

17. In light of these positive incentives created by resale of international private lines, we turn to specific regulatory concerns that must be addressed and incorporated in a U.S. international resale policy. In our Phase II Further Notice we sought comment on how we may realize full advantage of the CCITT's efforts to provide a revised, more liberal, Recommendation D.1, while limiting the opportunity for exclusive arrangements that would discriminate against competing U.S. carriers.[23] Because the international communications market involves a cooperative effort of service providers in two different countries, the provider at the foreign end, or the government under whose jurisdiction the foreign provider operates, has the power to facilitate or impede the success of a U.S. international resale policy.

18. There is considerable concern expressed in the record over "one-way" or "unilateral resale." By "one-way" resale the parties refer to a policy by an administration at the foreign end of an international circuit to allow entities in that country to resell private lines into the United States, and to connect these private lines to the U.S. public switched network, but not to allow entities in the United States to resell private lines into that foreign country and to connect these private lines to the foreign country's public switched network.[24] C&W, for example, states that "[t]he concern expressed in [our] Phase II Further Notice, . . . that unilateral resale can be used to evade accounting rates, is plainly a legitimate concern."[25] NTIA observes that "one-way service arrangements connecting to the public switched network in the United States pose serious threats to U.S. consumer rates, U.S. outpayments, and the promotion of long distance competition."[26] Norwegian Telecom was the only party that did not advocate limiting international resale to avoid "one-way" resale.[27]

19. We agree with the parties that "one-way" resale would give overseas administrations the incentive and the power to use such resale to evade the international settlements process or otherwise discriminate against competing U.S. carriers. If the foreign government were to allow resale to the United States but not allow resale from the United States, only users and service providers in that foreign country would benefit from the resale. Traffic diverted from U.S. carriers would reduce the number of minutes that the foreign correspondent would report under the international settlements process. Since equivalent resale would not be available from the United States, the U.S. carrier's outbound traffic volumes would remain unchanged. The result would be that the already significant U.S. net settlements deficit would increase, ultimately increasing the burden on U.S. ratepayers through, for example, higher rates. Such a lop-sided effect would not benefit U.S. consumers. In light of these circumstances, we conclude that "one-way" resale would be detrimental to the U.S. public interest.

20. Instead of requiring unlimited resale of international private lines to provide basic telecommunications services to all countries, we agree with the parties that we should require that U.S. carriers permit resale only on those routes where the foreign government affords equivalent resale opportunities. Both U.S. carriers and the representatives of foreign governments or carriers emphasize the importance of implementing resale at both ends only to those countries whose regulatory regimes allow a "broadly equivalent freedom"[28] or have "similarly liberal telecommunications regimes."[29] We believe that, to the extent that equivalent resale opportunities exist, any short-run traffic diversions will fall evenly on both correspondents. Moreover, both correspondents will have the same opportunity to respond to the reseller to attempt to retain their customers. Under these circumstances, the effects of resale, as well as the opportunities to receive the benefits of reduced rates and increased traffic volumes, will be equitably shared.

C. Equivalent Resale Opportunities

21. Having decided that resale of international private lines will yield public benefits, and that we should require resale only on those routes that afford equivalent resale opportunities, we turn to the issue of determining whether equivalent resale opportunities exist with a particular country. We shall require an applicant seeking authorization under Section 214 of the Communications Act to resell an international private line for the purpose of providing a basic telecommuncations service to a particular country to demonstrate that that country affords resale opportunities equivalent to those available under U.S. law. An applicant can satisfy this requirement by including in its Section 214 application: 1) a statement that the Commission has publicly determined that equivalent resale opportunities exist between the United States and the subject country;[30] or 2) other evidence demonstrating that equivalent resale opportunities exist between the United States and the foreign country, including any relevant bilateral agreements between the administrations involved.[31]

22. We will analyze each Section 214 application on a case-by-case basis to determine whether equivalent resale opportunities exist with a particular country. Communications markets and physical telecommunications infrastructures vary widely from country to country and are subject to change over time. Therefore, we decline to adopt NTIA's suggestion that we develop and issue "criteria" of openness to determine whether equivalent resale opportunities exist.[32] A demonstration of equivalent opportunities through a showing in a Section 214 application may include a wide range of issues. Parties may address issues such as: (1) licensing; (2) tariffing; and (3) other terms and conditions associated with the provision of service.[33] On the other hand, we expect, at a minimum, that equivalent resale opportunities will include open entry for, and nondiscriminatory treatment of, U.S.-based carriers.[34] In particular, we believe that primary importance must be given to ensuring that all U.S.-based carriers may provide service on price, terms and conditions equivalent to those afforded foreign-based competitors, including those competitors that have an ownership interest in, or sufficiently close corporate relation with, a carrier that either holds some form of privileged access to that country or exercises control over bottleneck facilities.

D. Regulatory Treatment

1. U.S. Carrier Tariffs

23. In view of our decision to require resale to countries where equivalent resale opportunities exist, we conclude that a carrier's tariffs should reasonably inform the user what it can and cannot do with the tariffed services.[35] We do not think that the resale provisions currently appearing in U.S. carriers' international private-line tariffs adequately reflect the policy we adopt in this proceeding. For example, a few carrier tariffs prohibit resale,[36] while others state that a user may resell private lines subject only to the possibility that a foreign government may require an operating agreement.[37] We shall thus require carriers to amend their tariffs for international private line services to track more closely the international resale policy we adopt in this decision. In particular, we shall require that a carrier's tariff explicitly state our policy that the user may engage in resale of the international private line for the provision of a basic telecommunication service upon authorization from the Commission under Section 214 of the Communications Act of 1934,[38] and that such authorization will be granted only to countries where the applicant can demonstrate that the foreign government or administration affords equivalent resale opportunities. To meet this requirement, carriers may wish to insert the following language:

> International private line service obtained from this tariff for the purpose of resale for the provision of third party services requires authorization from the Federal Communications Commission and a demonstration that the foreign government or administration affords equivalent resale opportunities.

Carriers will be required to amend their international private line tariffs within ten days after publication of this decision in the Federal Register.

2. Section 214 Certification

24. Because resale is a common carrier activity,[39] a user wishing to resell international private lines for the provision of a basic telecommunications service must first obtain certification as an international common carrier under Section 214 of the Communications Act. All Section 214 certificates for the resale of international private lines will be subject to the condition that the authorization may be subject to possible revocation or modification as a result of a finding by this Commission that equivalent resale opportunities do not exist between the United States and the subject country. Moreover, pursuant to our 1985 *International Competitive Carrier* decision,[40] we shall require a carrier, whether classified as dominant or non-dominant, to obtain Section 214 certification for each country to which it seeks to resell a private line, even if the carrier has previously been certified to serve such country through resale of switched services or through the acquisition of facilities. We will require dominant international resale carriers to obtain a Section 214 authorization for all circuit additions to certificated points.[41] Non-dominant international resale carriers will be required to file semi-annual reports of circuit additions to certificated points.[42] Finally, we note that we are, in a separate proceeding,[43] reviewing our *International Competitive Carrier* policy on the classification of international carriers, including resellers.

3. Reporting Requirements

25. After reviewing the comments of the parties, we have also concluded that we should, as requested by AT&T, amend Section 43.51 of our Rules to require U.S. carriers to file not only their operating agreements with their correspondents but also any arrangements for interconnections of private lines to the U.S. public switched network. We generally agree with AT&T that such a notification is needed to ascertain whether a carrier is using resold private lines to provide basic services in a way that would undermine Commission policies. We are not prepared at this time, however, to require the broad filing requirement proposed by AT&T in its October 12, 1990, comments in this proceeding. We agree with the User Coalition that the AT&T proposal is too broad and that it could unnecessarily sweep into it a large variety of arrangements for which we do not see a need for review and that such a requirement could burden users unduly.

26. In its reply comments in this proceeding, however, AT&T clarified that it does not now seek to require users to notify the Commission of private line interconnection arrangements, but only carriers. We interpret AT&T's clarification to seek notification only of connections where a U.S. carrier (or an affiliate) makes the connection for itself, an affiliate or another carrier. In this context, we believe that such a requirement would not be unduly burdensome. Thus, we will require that arrangements for carrier private line interconnection to the U.S. public switched network be filed under Section 43.51(a) of our Rules, 47 C.F.R. § 43.51(a). We do not, however, see a need to adopt AT&T's proposal that we place these interconnection filings on public notice and provide a period for filing oppositions. The filing of these arrangements should be sufficient to determine whether carriers are reselling international private lines without appropriate Section 214 certification or otherwise undermining Commission policies. A violation of our international resale policies may be challenged at any time by either

the Commission or an interested person. But we have ample authority through, for instance, Sections 312(b) and 503 of the Communications Act and our international settlement policies, to take corrective action for violations of our decision herein that resale should occur only on routes that afford equivalent resale opportunities.

IV. CONCLUSION

27. In this First Report and Order we have taken steps in our regulatory oversight of international settlement arrangements to encourage the resale of international private lines to countries where equivalent resale opportunities exist. We believe that this action appropriately balances our interest in limiting opportunities for discrimination against competing U.S. carriers while encouraging the implementation of lower, more economically efficient, cost-based international accounting rates and international calling price reductions for U.S. consumers.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, 201-205, 211, 214, 218-220, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 211, 214, 218-220, and 303, Parts 43 and 63 of the Commission's Rules, 47 C.F.R. Parts 43 and 63 ARE AMENDED as set forth in Appendix B below.

29. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

30. IT IS FURTHER ORDERED that U.S. carriers shall amend their tariffs, detailed in paragraph 23 above, within ten (10) days after publication of this decision in the Federal Register.

31. IT IS FURTHER ORDERED that all other provisions in this *First Report and Order* not detailed in paragraph 23 above will be effective 90 days after publication of this decision in the Federal Register.

32. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated to act on matters pertaining to implementation of the policies, rules, and requirements as set forth herein.

33. For further information on this item contact John Copes, Attorney/Advisor, International Policy Division, Common Carrier Bureau, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS:

1. Computer Software and Services Industry Association (ADAPSO)
2. American Telegraph and Telephone Company (AT&T)
3. Atlantic Tele-Network, Inc. (ATN)
4. Government of the United Kingdom (through British Embassy)
5. Cap Cities/ ABC, CBS & NBC (Cap Cities)
6. Caribbean Association of National Telecommunications Organizations (CANTO)
7. Cable and Wireless Communications, Inc. (C&W)
8. GTE Telephone Companies (GTE)
9. MCI Telecommunications Corporation (MCI)
10. Mercury Communications (Mercury)
11. National Association of Regulatory Utility Commissioners (NARUC)
12. Norwegian Telecom International (Norwegian Telecom)
13. National Telecommunications and Information Administration (NTIA)
14. Pan American Satellite (PAS)
15. Teleglobe Canada Inc. (Teleglobe)
16. Televerket/Swedish Telecom Group (Televerket)
17. TRT/FTC Communications, Inc. (TRT/FTCC)
18. US Sprint Communications Company, L.P. (US Sprint)

REPLY COMMENTS:

1. AT&T
2. The Coalition of International Telecommunications Users (User Coalition)
3. GTE
4. Guyana Telephone and Telegraph Ltd. (GT&T)
5. MCI
6. NTIA
7. Telepuertos San Isidro, S.A. (TRICOM)
8. Televerket
9. Telecommunications Services of Trinidad and Tobago Limited (TSTT)
10. TRT/FTC
11. US Sprint

APPENDIX B

Title 47 of the Code of Federal Regulations, Parts 43 and 63, are amended as follows:

1. The authority citation for Part 43 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

2. Section 43.51 is amended by revising paragraph (a) to read as follows:

§ 43.51 Contracts and Concessions

(a) Any communications common carrier engaged in domestic or foreign communications, or both, which has not been classified as non-dominant pursuant to § 61.3 of the Commission's Rules, 47 CFR § 61.3, is not treated under the regulatory forbearance policies established by the Commission, and which enters into a contract with another carrier, including an operating agreement with a communications entity in a foreign point for the provision of a common carrier service between the United States and that point, must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following:

(1) the exchange of services;

(2) except as provided in paragraph (c) of this section, the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances;

(3) the interconnection of a private line to the United States' public switched network when such private line is used for foreign communications; and

(4) the rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

1. The authority citation for Part 63 continues to read as follows:

Authority: Sec. 4, 48 Stat 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

2. Section 63.01 is amended by adding subparagraph (k)(5) to read as follows:

§ 63.01 Contents of Applications

(k)(5) The procedures set forth in this subsection are subject to Commission policies on resale of international private lines in CC Docket No. 90-337. If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international services, applicant shall demonstrate for each country to which it seeks to provide service that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall:

(i) state whether the Commission has previously determined that equivalent resale opportunities exist between the United States and the subject country; or

(ii) include other evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral agreements between the administrations involved. Parties may address such issues as: (1) licensing; (2) tariffing; and (3) other terms and conditions associated with the provision of service.

APPENDIX C
PROCEDURAL MATTERS

Final Regulatory Flexibility Analysis

I. Need and purpose of this action:

This Phase II First Report and Order of CC Docket No. 90-337 takes steps to encourage the resale of international private lines to countries where equivalent resale opportunities exist, while limiting opportunities for discrimination against competing U.S. carriers. The steps taken herein will further the Commission's goal of promoting lower, more cost-based, economically efficient international accounting rates and reductions in international calling prices to U.S. consumers.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The Commission considered requiring unlimited resale of international private lines to all countries. The Commission decided, however, that it should limit requiring resale of international private lines only to countries where equivalent resale opportunities exist. This action provides for the Commission flexibility to deal with potential anticompetitive consequences that would result from, for example, where a foreign country permits a reseller of an international private line to interconnect that private line to the U.S. public switched network but does not permit a reseller of a private line from the United States to connect that private line to the public switched network of the foreign country.

The Commission considered developing and issuing "criteria of openness" to assess whether equivalent resale opportunities exist with a particular country. The Commission decided, however, that because communications markets and physical telecommunications infrastructures vary widely from country to country and are subject to change over time, the Commission should analyze each Section 214 application for authority to resell private lines to a particular country on a case-by-case basis to determine whether equivalent resale opportunities exist.

FOOTNOTES

[1] In this connection, we stated that we would not permit operating agreements between U.S. carriers and their overseas correspondents to apply resale prohibitions imposed by overseas governments or carriers. *See* 6 FCC Rcd at 3437, n. 33. We further proposed to direct the Common Carrier Bureau to review operating agreements and to declare any such provisions null and void.

[2] *Id.* at 3437.

[3] *See id.*, n. 34.

[4] We note that we have authorized U.S. carriers to provide telecommunications services by resale of international switched services, including international message telephone service, since 1980. *See* ITT World Communications, Inc. v. Consortium Communications International, 76 FCC 2d 15 (1980). We note that none of the parties in this proceeding objected to unlimited resale of international switched services. Moreover, the concerns about the negative impact of one-way resale, *see infra* paras. 17 through 20, do not apply to switched services. Therefore, we shall require U.S. carriers to permit unlimited resale of all their international switched telecommunications services. The remainder of this decision addresses the resale of international private lines.

[5] In this decision we address the issues associated with international resale. The other issues raised in our Phase II Further Notice will be dealt with in a subsequent decision.

[6] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *reconsid.* 62 FCC 2d 588 (1977), *aff'd sub nom. American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) [hereafter cited as *Domestic Resale Decision*].

[7] That decision defined resale as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without 'adding value') for profit." 60 FCC 2d at 271.

[8] 77 FCC 2d 831 (1980). Pursuant to a delegation of authority in our Phase II Further Notice, the Chief, Common Carrier Bureau, on December 10, 1991, terminated that proceeding. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, CC Docket No. 80-176 (Com. Car. Bur., adopted December 10, 1991).

[9] *See* , *e.g.*, Western Union International, Inc., Tariff FCC No. 27, Sections 1.3.1.1 and 1.3.3.1, original pp 9 and 11 (effective April 1, 1990).

[10] Recommendation D.1 "sets out the general principles and conditions applicable to international (continental and intercontinental) private leased telecommunication circuits and networks . . . for the establishment, operation, and use of international private leased telecommunication circuits." We note that our use of the term international private lines in this decision is what the CCITT refers to as "international private leased circuits."

Prior to the 1991 revision, Recommendation D.1 contained a presumption against using international private lines other than for the customer's internal communications. Section 1.7, for example, provided that:

> [w]ithin the limits fixed by Administrations in each case, private leased circuits may be used only to exchange communications relating to the business of the customer.

Furthermore, Section 7.3.1 stated that:

> [a]ccess to the public telephone network may be allowed at one or the other terminals of the circuit, but not simultaneously at both terminals . . . .

Recommendation D.1, however, provided that the Administrations (service providers) providing the private leased circuit could exceptionally agree to allow resale or interconnection at both terminals. *See* International Telecommunication Union (ITU), International Telephone and Telegraph Consultative Committee (CCITT), CCITT Recommendation D.1, "General Principles for the Lease of International (Continental and Intercontinental) Private Telecommunication Circuits, Sections 1.7 and 7.3.1, Geneva (November 1988).

Revised Recommendation D.1, on the other hand, contains no such negative presumption. Section 3.1.1 of the current D.1 provides that, in addition to using the private line for its internal communications, a "customer may [use such circuit to] provide international telecommunication services" and Section 4.1 provides that:

> [t]he interconnection of an international private leased telecommunication circuit . . . may be permitted simultaneously at both terminals of the circuit . . . if agreed between the Members [*i.e.*, the governments, rather than the service providers] concerned . . . .

See ITU, CCITT, Access to Public Networks, Revised CCITT Recommendation D.1, "General Principles for the Lease of International (Continental and Intercontinental) Private Telecommunication Circuits and Networks, Sections 3.1.1 and 4.1, Geneva (May 1991).

[11] *See, e.g.*, Applications of Litel Telecommunications Corporation, File No. I-T-C-90-028; Cable and Wireless Communications, Inc., File No. I-T-C-90-190; Eastern Microwave, Inc., File No. I-T-C-91-050; and fONOROLA Corporation, File No. I-T-C-91-103.

[12] AT&T, MCI Telecommunications Corporation (MCI), U.S. Sprint Communications Company (Sprint), TRT/FTC Communications, Inc. (TRT/FTCC), and Cable and Wireless Communications Inc. (C&W).

[13] Norwegian Telecom International (Norwegian Telecom) and Televerket (Swedish Telecom Group) (Televerket).

[14] ADAPSO, The Computer Software and Services Industry Association (ADAPSO) and the Coalition of International Telecommunications Users (Citicorp, Electronic Data Systems Corporation, General Electric Communications and Services, and International Business Machines Corporation) (User Coalition). ADAPSO has since changed its name to Information Technology Association of America. For a complete list of the comments filed to the Phase II Further Notice, *see* Appendix A.

[15] Regulation of International Accounting Rates, Notice of Proposed Rule Making, 5 FCC Rcd 4948, 4950 (1990).

[16] Article 3.1.3 of Recommendation D.1 provides that,

> [s]ubject to national laws [of the countries involved] the customer [*i.e.*, user of an international private line] may . . . provide international telecommunications services using an international private leased telecommunications circuit [*i.e.*, private line] . . . .

Article 4.1 of Recommendation D.1 provides that,

> [t]he interconnection of international private [lines] or international private [line] networks with public networks at only one [end] should be permitted subject to national laws [and] . . . may be permitted simultaneously at both [ends] if agreed between the Members concerned ....

Recommendation D.1, at Articles 3.1.3. and 4.1.

[17] We note that enhanced service providers are not required to obtain certification under Section 214 to provide enhanced services over international private lines.

[18] We note that the UK government, on the other hand, defines "international simple resale" (presumably, as contrasted with enhanced or value-added resale) in terms of connecting an international private line to the PSN at both ends. While we do not regard PSN connection as defining resale, we recognize that the ability to connect to the PSN, particularly the ability to connect at both ends of the private line, is important to the successful offer of resale services. Indeed, for switched services such as IMTS, it is difficult to see how resale could be successful without the ability to connect the private line to the PSN at both ends. This Commission has, since 1976, allowed connections to the PSN at both ends for domestic resale. Therefore, subject to the international private line resale policies we adopt in this decision, we shall also require U.S. carriers to permit international resale carriers to connect international private lines to the U.S. public switched network.

[19] Carriers owning transmission facilities from whom resale entities obtain communications service shall be referred to as "underlying carriers."

[20] In this connection, we note the argument of C&W that resale could cause carriers to increase the charges for private lines if they are unreasonably low in relation to the charges for the services the reseller is providing over the resold private line. As we have made clear on many occasions, we favor charges for service that are based on cost. If a carrier has set private-line charges below cost of service, that means it must recover those costs from the customers of other services such as IMTS. Such a cross-subsidy could represent a discrimination against the customers providing the revenues for the subsidy.

[21] For example, interstate long distance service traffic volumes have grown at an annual rate of 12 percent, more than doubling usage of the interstate switched network since 1984. Moreover, revenues have increased substantially despite reductions in calling prices of more than 40 percent. *See* "Trends in Telephone Service," Industry Analysis Division, FCC (August 7, 1991).

[22] For example, a carrier with a net outbound traffic flow would weigh a reduction in its revenues against its ability to meet its obligation to settle its account (outpayment) with its foreign correspondent.

[23] Phase II Further Notice, 6 FCC Rcd at 3437.

[24] Underlying the argument of the parties concerning "one-way" resale is an assumption that the reseller would operate at both ends of the international private line -- or, in traditional IMTS terms, that the reseller in the United States would act as its own correspondent at the other end of the international circuit. Under such circumstances, the parties assume that the reseller would not need to enter into an operating agreement or to settle its traffic account under an agreed and uniform international accounting rate. We note, however, that on February 5, 1990, AT&T filed a petition for declaratory ruling seeking, *inter alia*, a Commission determination that U.S.- based carriers must comply with the Commission's International Settlements Policy when providing "an IMTS option" over an international private line. *See* AT&T Petition for Expedited Declaratory Ruling, CC Docket 86-494 (February 5, 1990). We do not resolve this issue here.

[25] C&W Comments at 12, n. 11. For this reason, C&W advocates only "bidirectional" international resale. *See also* Comments of AT&T, MCI, NARUC, NTIA, and Sprint. The UK government made clear in its comments that it too is concerned that diversion of UK revenues would result from one-way resale. It stated that it would therefore allow international resale only to those countries that also allow it. In addition, Teleglobe notes that the government of Canada allows international resale only to countries that allow such resale in the reverse direction. Teleglobe comments at p. 8. Televerket notes in its comments, p. 10, that the government of Sweden is also considering the liberalization of international resale, but only to countries that have similarly liberal telecommunications regimes.

[26] NTIA Reply Comments at 14.

[27] While not addressing specifically the issue of one-way resale, Norwegian Telecom argued that international resale can be of benefit only if it is authorized not only to countries that have acted to bring collection and accounting rates to cost but also to other countries with less liberal regimes. It does not, however, discuss how such a policy would be implemented to a country that opposed the introduction of resale.

[28] British Embassy Comments at 3.

[29] Swedish Telecom Comments at 10.

[30] Such a determination may, for example, be evidenced by a public notice issued by this Commission or in a Section 214 certificate previously granted to another carrier. Moreover, we note that we will continue to monitor whether a foreign country affords, in fact, equivalent resale opportunities after a Commission determination. Thus, we may require international resale carriers to file additional information necessary for monitoring purposes. If circumstances in the future indicate that equivalent resale opportunities no longer exist with a particular country, we will be prepared to take appropriate regulatory action to ensure that our international resale policies are not frustrated.

[31] We have established a new subsection under Section 63.01 of our Rules, 47 C.F.R. § 63.01(k)(5) to reflect this requirement, *see* Appendix B.

[32] NTIA Reply Comments at 15.

[33] In this connection, AT&T notes that other countries limit market entry to only one or two service providers. *See* AT&T Reply Comments at 18-19. *See also* Sprint Reply Comments at 6. US Sprint argues that we should consider information regarding foreign termination, access and non-recurring costs. *See* US Sprint Comments at 17. US Sprint also argues that we should consider the length of time it takes to obtain a private line for resale purposes. *Id.* MCI states more generally that we should require, as a matter of U.S. law, unrestricted resale of international private lines for all U.S. carriers provided that the arrangement permits reciprocal public switched interconnection in the foreign country. *See* MCI Comments at 14.

[34] In this context, an equivalent resale opportunity would include the ability for a user to connect an international private line to the PSN at both ends of the international circuit.

[35] All carriers, whether dominant or non-dominant, are required to file tariffs with this Commission for international basic telecommunications services.

[36] *See supra* note 9.

[37] *See, e.g.*, AT&T Tariff F.C.C. No. 9, Section 2.2.3.A.

[38] We note that enhanced service providers are not required to obtain certification under Section 214 to provide enhanced service over international private lines. *See supra* note 17.

[39] *Domestic Resale Decision*, 60 FCC 2d at 308.

[40] International Competitive Carrier Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986).

[41] 47 C.F.R. § 63.01.

[42] 47 C.F.R. § 63.10.

[43] Regulation of International Common Carrier Services, Notice of Proposed Rule Making, _____ Docket No. 92-_____, FCC 92-_____ (adopted December 12, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-432

In re Applications of

WELCH COMMUNICATIONS, INC. File No. BPH-870827MY

SWAN CREEK COMMUNICATIONS File No. BPH-870827NJ

For Construction Permit for
New FM Station, Channel 297A
Swanton, Ohio

Appearances

J. Richard Carr and *Audrey Allison* on behalf of Welch Communications, Inc.; *Christopher D. Imlay* on behalf of Swan Creek Communications; and *Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: January 9, 1992; Released: January 24, 1992

INTRODUCTION

1. Back on May 9, 1990, the Trial Judge issued his Initial Decision in this case. *See* FCC 90D-20. There he granted Swan Creek Communications' (Swan Creek's) FM application for Swanton, Ohio and denied Welch Communications, Inc.'s (Welch's) mutually-exclusive application. The *only* factual issue on which evidence was adduced was the standard comparative issue. The Trial Judge held that Swan Creek was entitled to 100% quantitative integration, while Welch was awarded 0% quantitative integration.

2. The Review Board remanded. *See* FCC 90R-68 released August 7, 1990. The Board was concerned whether the winner Swan Creek was financially qualified even though there were no financial issues against either Swan Creek or Welch.[1] So they added a financial and a financial misrepresentation issue against Swan Creek.

3. Upon remand the Trial Judge then voiced his concerns with Welch's application (FCC 90M-2764 released September 4, 1990). He added a financial, a financial misrepresentation, and abuse of process issues against Welch.

4. As a result, on remand we took evidence on the following five basic qualifying issues:

Welch - 1: To determine whether Welch Communications is and/or was financially qualified to construct and operate its proposed facility;

Welch - 2: To determine whether Welch Communications lacked candor with and/or misrepresented its financial qualifications to the Commission, and if so, the effect thereof on their basic qualifications to be a Commission licensee;

Welch - 3: To determine whether Welch Communications has abused the Commission's processes by intentionally and inappropriately prosecuting a comparative amendment in contravention of the Hearing Designation Order;

Swan - 1 To determine whether Swan Creek Communications is and/or was financially qualified to construct and operate its proposed facility; and

Swan - 2 To determine whether Swan Creek Communications lacked candor with and/or misrepresented its financial qualifications to the Commission, and if so, the effect thereof on their basic qualifications to be a Commission licensee.

5. A remanded hearing conference was held on December 10, 1990, and an evidentiary admission session on January 4, 1991. We held the remanded hearing on February 26, 1991, and closed the remanded evidentiary record the same day.[2]

6. They filed their remanded Proposed Findings of Fact on April 15, 1991. Swan Creek filed their Reply Findings on May 1, 1991, and Welch filed theirs the following day.

FINDINGS OF FACT

The Welch Financial Issues: Welch 1 - 2

7. Welch, a stock corporation, is incorporated in Delaware. As of the relevant cut-off date[3] the following chart depicts their ownership structure:

CHART

Principal	Position	Equity Interest
W. Charles Welch	President, Secretary, Director	1,500 shares (50%)
Community Development Center	---	1,500 shares (50%)

8. In their application (BPH-870827MY) they also represented that the Community Development Center (CDC) would confer the exclusive and sole right to vote its 1500 shares on a Mr. Paul Jones. But, at that time, Jones had no connection whatsoever with CDC.

9. Charles Welch certified that Welch, Inc. had sufficient net liquid assets on hand or available from committed sources to construct and operate their proposal and operate it for three months without revenue. He was aware of the terms of the financial test at the time he certified (Tr. 607; 662).

10. At the time he was deposed, Charles Welch said that when he certified he was relying on three different financial sources: (1) a [loan] letter from the Broadcast Capital Fund (Broadcap); (2) a fund commitment from CDC; and (3) his own personal funds (Tr. 662-663, 670).

11. However, at the February 26, 1991 remanded hearing, Charles Welch changed his tune. There he said that the basis for his August 27, 1987 financial certification was the August 25, 1987 letter from Broadcap. That letter (WRE-Ex. 4) was signed by one Kenneth O. Harris, a Broadcap Vice-President. The letter proved to be nothing more than an accommodation.

12. At the time Welch Communications filed its application, Charles Welch had no personal financial statement. No such statement existed. So he had none to give Broadcap. In fact he has never given Broadcap a personal financial statement, or any other financial documents (Tr. 696). And Broadcap has never asked him for any.

13. At the time Charles Welch certified Welch's finances, he had allegedly made some written calculations about what it would cost to build and operate the station for three months without revenue. But such calculations were informal and not organized. Welch merely jotted some numbers down on legal pads. So he had nothing to submit to Broadcap or anyone else. He never conveyed his handwritten documents to anyone.[4]

14. Conversely, before August 27, 1987, when Welch Communications filed their application, Charles Welch had taken no steps to find out whether Broadcap had $200,000 - $250,000 in funds available for him. The only reason he believed Broadcap had the money was because Broadcap had helped fund a station in Tampa, Florida for a friend of his (Tr. 695).

15. Turning to the so-called funds CDC had committed (see Para. 10(2)), the record shows that on August 25, 1987 (two days before he certified) CDC sent Charles Welch a letter along with a resolution of CDC's Board of Directors. The resolution purportedly authorized CDC's Executive Director, Robert J. Webb, Jr. to "borrow" $26,000 from CDC's "reserve account" to be used "in the purchase of the FM radio station." The resolution further authorized Webb to sign, execute and endorse such documents needed or required to evidence "such equity purchase" (SCRE-8). Since Welch Communications wasn't purchasing any FM radio station, the resolution was of doubtful validity.

16. For his part, Charles Welch says he thought he was going to get a lot more than $26,000 for their (CDC's) 50% equity (see para. 7 *supra*.), but he didn't know how much more. There was nothing in writing to evidence any such commitment from CDC. Charles Welch admits that giving CDC a 50% equity position in his Swanton proposal was "an act of faith" (Tr. 687-688).

17. As previously noted (para. 12 *supra*.) as of August 25, 1987, Charles Welch had no personal financial statement to give CDC. He has never given CDC any financial documents, and they have never asked him for any.[5] In fact, at the time, Charles Welch didn't know anything about CDC except from hearsay he understood that CDC was somehow federally funded, county funded, city funded or somehow otherwise funded.

18. Turning to his own personal funds (para. 10(3) *supra*.), Welch's counsel clarified that he (Welch) wasn't going to use any of his personal funds to *prosecute* his proposal, and that he would not be using personal funds for construction and operation expenses. However the record does also show that after CDC formally bowed out of the picture, in order to prosecute the Welch application, Charles Welch had to borrow money from his father-in-law, Amos Chester, and from a friend of his, Otis Greene.

19. Charles Welch evidently recognized that the Broadcap August 25, 1987 loan letter was deficient. On or about March 29, 1989, Victor H. Brown gave Charles Welch *another* loan letter. It contained additional terms and changed the proposed interest rate for the loan from 10% to 12%. Most importantly, under the 1989 letter, Broadcap would get a stock warrant interest of up to 30% in Welch Communications, Inc. Charles Welch says that Broadcap never explained the differences between the two letters. Moreover, Welch has never amended its application to reflect this potential 30% ownership change (Tr. 707-708).

20. *Welch 1 - 2 Intermediate Findings*. Welch Communications was not financially qualified on August 27, 1987 when Charles Welch certified that they were. The so-called Broadcap loan letter was valueless; CDC hadn't committed any funds; and Charles Welch didn't personally have the net liquid assets to construct his proposal and operate it for three months without revenue.

21. Moreover, at the time he certified, Charles Welch was familiar with the Commission's net liquid asset test, and he knew what he was certifying to (Tr. 607; 662). So when he certified, he knew that his certification lacked candor at best, and at worst was a calloused misrepresentation.

22. Moreover, the record shows that Welch Communications is still not financially qualified. Broadcap's March 29, 1989 loan letter with its 30% stock warrant interest would substantially change Welch's ownership picture. Consequently, and even if Broadcap's belated March 29, 1989 loan letter were considered, it still wouldn't pass muster. So both Welch-1 and Welch-2 must be decided adversely to Welch Communications.

Welch - 3: Abuse of Process

23. As previously noted (Finding 7 *supra*.) Welch Communications was originally owned 50% by Charles Welch and 50% by the Community Development Center. After CDC withdrew (see *infra*.) in May of 1988, Welch attempted to amend its application to reflect CDC's withdrawal. He filed an amendment on June 23, 1988.

24. In the Hearing Designation Order, the Chief, Audio Service Division noted that Welch's amendment was filed after the last date for filing minor amendments as a matter of right. He then went ahead and accepted the amendment under 47 CFR 1.65. "However," he said, "an applicant may not improve its comparative position after the time for filing amendments as a matter of right has passed. Therefore, any comparative advantage resulting from the amendment[s] will be disallowed." *See* 55 F.R. 43035 published October 25, 1988, at para. 9.[6]

25. Welch, however, continued to prosecute its application as if Charles Welch were Welch Communications, Inc.'s only principal, ultimately claiming 100% quantitative integration. His attempt to deliberately circumvent the Chief, Audio Services Division's holding earned Welch Communications 0% quantitative integration. *See* FCC 90D-20 released May 9, 1990, conclusions 8-9.

26. Charles Welch says that he so prosecuted his proposal because his counsel told him " . . . a legal argument could be made that Welch should receive 100% *quantitative* integration credit for his proposed integration into station management . . . ."

27. Welch says: that he accepted his counsel's advice, and had his integration statement and direct case exhibits prepared accordingly; that he had no reason to believe that following his attorney's recommendation was in any way improper; that he expected the Presiding Judge would either accept or reject the argument -- not find it an abuse; and that he has not intended to deceive anyone nor abuse the Commission's processes in any respect (WRE Ex. 2, pp. 1-3). He describes his claim for 100% quantitative integration credit as " . . . merely a routine legal assertion made in the context of a comparative hearing," an assertion " . . . made in good faith . . . ."

The Swan Creek Financial Issues: Swan 1 - 2

28. As the Review Board's remand order makes abundantly clear (FCC 90R-68 released August 7, 1990) serious questions about Swan Creek's financial viability came up during the first hearing. It developed that the Swan Creek partners, Jerry Toth and Thomas Gardull, were relying on the same personal assets to construct and operate both their Swanton, Ohio proposal and one for Lima, Ohio as well.

29. At Tr. 326-329, Toth gave the following testimony:

> ALJ: . . . How are you going to finance both Lima and
>
> Swanton? . . . Have you discussed that with Tom?
>
> Toth: Yes, we have discussed it. It has come up and there is no way we could finance both of them.
>
> ALJ: You are going to have to dismiss one of them?
>
> Toth: I don't know if I want to say dismiss, there is a chance that we could combine with another applicant that is down there.
>
> ALJ: Down where, in Lima?
>
> Toth: In Lima, yes. Lima was applied for as a second possibility, should Swanton not be successful . . . We had the possibility of a second chance on getting an FM.
>
> ALJ: Do I understand you're saying to me that you are willing to take one of the two? Is that what you are really saying?
>
> Toth: Yes, sir, we are just trying to cover ourselves.
>
> ALJ: And your preference is Swanton over Lima?[7]
>
> Toth: Exactly.

30. A short time later (Tr. 344-345) Toth's partner, Thomas Gardull, testified on the same subject:

> Q. Turning to the Lima, Ohio application, if both applications were granted, Mr. Toth testified that you and he had agreed that you did not have enough resources to do both projects. Do you agree with that ?
>
> A. I agree with that. Let me back off, there are certainly very cheap ways of putting a radio station on the air and I'm afraid that wouldn't win us a comparative hearing, but there are still ways, that I guess I could put a radio station on the air for next to no money,[8] being an engineer I have sources of equipment.

31. Toth and Gardull gave the just-quoted testimony (paras. 28-29) on March 17, 1989 (Tr. Vol. 3). On April 25, 1989, Welch moved to enlarge the issues against Swan Creek. Welch sought a financial and a false financial certification issue against Swan Creek. Swan Creek countered, on May 8, 1989, by requesting that the Lima application be dismissed. And in its May 10, 1989 opposition to Welch's enlargement request, Swan Creek said this:

> "Swan Creek certified its ability to finance the Swanton station, and later to its ability to finance the Lima station. Never did it certify that it was financially qualified to build both at the same time . . . So it never misrepresented anything. Now, however the matter is moot as Swan Creek has dismissed its application . . . As the testimony clearly indicates, Lima was applied for as a back-up to the Swanton application (Tr. 328). Although Swan Creek could build both stations, it was never really its intention to do so.
>
> . . .
>
> Swan Creek is, and always has been, financially qualified to build and operate *at least one of the FM stations for three months without revenue*. It never certified that it was always qualified to build both . . ."

32. On May 25, 1989, the Trial Judge denied Welch's enlargement request for either of two reasons. First, he held that Welch's *post - hearing* motion was tardy in the extreme; and secondly, he held that Welch had not demonstrated that Swan Creek had misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective. *See* FCC 89M-1530 released May 25, 1989.

33. The Trial Judge further addressed the serious character charges Welch had leveled against Toth and Gardull. He said (FCC 89M-1530, *supra*, para. 10):

> . . . On March 27, 1989, the Presiding Officer had an opportunity to observe Jerry Toth's and Thomas Gardull's demeanor . . . He observed nothing that would cause him to doubt their truth and veracity. To the contrary, he was favorably impressed with the testimony of both people. Welch's accusations are without merit . . . ."

34. As is clear from their remand order, the Review Board ignored the tardiness of Welch's *post - hearing* enlargement allegations, refused to honor the Lima application dismissal, and credited Welch's accusations that Swan Creek may have deceived the Commission by certifying two applications "when it (Swan) appears to know it could only afford to finance (at best) only one."

35. The Review Board not only remanded, they made findings that would severely limit Swan Creek's hearing options at the remanded hearing. They concluded:

> "Thus, for more than one year (between at least April 7, 1988 and May 8, 1989) when both of Swan's applications were pending before the Commission, Swan essentially concedes that it was not financially qualified to construct and operate *both* these proposed facilities. Consequently, the affirmative financial certifications contained in both applications could not have been validly operative at the same time."

36. Having been cut off from the benefits that accrued from dismissing the Lima application, Swan Creek (on remand) has fallen back to the *only* position available to it that is consistent with the first evidentiary record. That is the position that Thomas Gardull took at Tr. 344-345 (Finding 39 *supra.*); namely, that Swan Creek was financially qualified to construct and operate both proposals if they employed " . . . very cheap ways . . . " of putting the Lima station on the air " . . . for next to no money . . . ." The following findings must be evaluated with that Review Board constraint in mind.

37. Jerry Toth and Tom Gardull estimate that their construction costs for the Swanton operation would be $108,000, and that they would need $33,000 for three-months operating expenses. Thus they project a total outlay of $141,000 for Swanton.

38. Based on a "limited budget" for the Lima proposal, Toth and Gardull claim that the Lima station can be built for $22,000 and that it can be operated for three months without revenue for $12,000. Thus, they project a total outlay of $34,000 for Lima.

39. The estimated total outlay for both the Swanton and Lima proposals would be $175,000 ($141,000 plus $34,000). To meet those expenses Toth and Gardull have agreed to use their own funds along with a promised loan of $125,000 from Jerry Toth's father, Rudolph Toth. Tom Gardull is to provide $52,000, and Jerry Toth $50,000. Thus,, if their figures are accepted, Swan Creek would have $227,000 ($125,000 plus $52,000 plus $50,000) available to meet the $175,000 projected outlay.

40. Of course, if the Lima application dismissal were credited Swan Creek would have $227,000 available to meet the Swanton projected costs of $141,000.

41. However, the foregoing analysis (Findings 37-40 *supra.*) is based on numerous evidentiary assumptions that require additional evaluation.

42. Let's turn first to Tom Gardull's ability to provide $52,000 in net liquid assets. Gardull's November 1, 1988 balance sheet shows that he has $90,000 in total assets. This includes $50,000 for his residence (nonliquid), $11,000 for a stamp collection (nonliquid), and $1,000 for electronic equipment. In fact Gardull showed only cash and liquid assets of $23,000. Mr. Gardull's annual salary at the time Swan Creek filed its application was about $25,000.

43. Let's turn next to Jerry Toth's ability to provide $50,000 in net liquid assets. According to his November 10, 1988 balance sheet, he has (1) 4608 45 rpm records worth $4608; (2) 326 albums worth $1630; (3) 122 music tapes worth $1220; (4) Home Entertainment Equipment worth $2218; (5) 2 vehicles worth $8,000; (6) Ham Radio Equipment worth $4100; and (7) Apple Computer Equipment worth $950. The liquidity of this $22,726 is dubious. Toth shows $25,926 in cash and stocks.

44. As one might assume, Toth's and Gardull's claim that they would construct their Lima proposal for $22,000 (Finding 38 *supra)* is of doubtful validity. They claim that they had a pre-filing agreement with a Ron Mighell, the CEO of WTLW(TV), Channel 44, that would permit them to operate from WTLW's existing facilities for $2,000 a month. However, no copy of that agreement was submitted into evidence. Under the purported agreement, Swan Creek would use WTLW's tower, its transmitter building, and its staff to read meters and change audio tapes twice daily. In addition, WTLW would make a small amount of space available to Swan Creek, enough space for a small desk or table and one telephone (Swan Creek Remand Ex. 1 at 5; Tr. 820-821). The following chart shows Swan Creek's construction cost estimates for the Lima proposal:

CHART

Number	Construction Item	Cost	Comment
1	Transmitter building	No cost	Use ch. 44's
2	Install electric	No cost	Use ch. 44
3	Construct tower	No cost	Use ch. 44
4	Purchase coax cable	$2,000	Used
5	Transmitter/exciter	$15,000	Used
6	Stereo/generator	$500	Used
7	Antenna	$1,000	Used
8	Install coax, antenna	$1,000	
9	Fence	No cost	Used ch 44's
10	Cable pressure	No cost	Used ch 44's
11	Remote control	No cost	Use ch 44's
12	Audio processing	Not included	
13	Cabinets	$50	Used
14	Monitors	$50	Used
15	Generators	No cost	Use ch 44's
		$20,700	
	Studio		
	Use automation already owned by principal		
	Additional studio equipment	$1,000	
	EBS	No cost	Used ch 44's
	Installation, wire	$300	
		$22,000	

45. Similarly, to Toth and Gardull's $12,000 three-month cost of operation is also of doubtful validity. The following chart shows an "Estimated Start-up Costs Budget No Frills" for the Lima operation:

CHART

A. Personal

1. No announcers (automated)
2. No office staff (principals do the work)
3. Managers (no salary, not on premises)
4. Sales on commission
5. Payroll taxes based on commissioned employees

No Expense

B. Utilities

1. Telephone one line x $25 =	$ 25	
2. Electric	$300	
		$325

C. Legal

1. Royalties	$ 400	
2. Insurance	$ 400	
3. Fees and Taxes	$ 50	
4. Accountant	$ 50	
		$900

D. Operations

1. Office supplies	$ 200	
2. Printing	$ 50	
3. Photocopy	$ 50	
4. Miscellaneous	100	
5. Channel 44 contract	$2,000	
a. tower		
b. inside rack space		
c. utilize control point		
		$2,400

E. Contingency

	$ 375	
	Total Monthly	$4,000

Note: Station would be automated with tape; salesmen would work out of their cars, principals would produce programming in Toledo and Channel 44 operators would change tapes twice a day and take meter readings.

46. The paragraph 45 chart along with testimony at the remanded hearing indicates that the Lima "limited budget" operation would have a fully-automated, easy listening format. There would no employees on the premises: no managers, no announcers, no office staff -- not even a receptionist.

47. Swab Creek would hire two salesmen who would work strictly on commission from their cars. Those salesmen would presumably not be reimbursed for using their vehicles, for their gasoline and oil, and related expenses for three months.[9] There would be no studio in Lima, and no production facilities.

48. The Lima station programming would consist entirely of pre-recorded music on reel-to-reel tapes that Toth and Gardull prepared in their "spare time" at the Swanton station or in Toth's parents' basement. Those tapes would be mailed or driven to Lima every so often until a library of tapes would accumulate in Lima which could be continuously repeated. Jerry Toth indicated that it wouldn't matter how long it took the tapes to arrive in Lima because they wouldn't contain any timely material anyway.

Issue 1 - The Standard Comparative Issue

49. The findings of fact under the standard comparative issue appear at paragraphs 5-43 of the Initial Decision, FCC 90D-20 released May 9, 1990; they needn't be repeated here. They are not impacted by the remanded hearing. However, the comparative conclusions of law in FCC 90D-20 *supra*., probably no longer obtain.[10] In any event, comparative findings of fact exist, and there is no need for the appellate body to remand on the comparative issue, *See WFPG, Inc*., 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting Co*., 30 FCC 932, 21 RR 732 at Footnote 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Welch Communications, Inc. (Welch) and Swan Creek Communications (Swan Creek) remain in the running for FM Channel 297A in Swanton, Ohio.

2. The Review Board has remanded the case. *See* FCC 90R-68 released August 7, 1990, and we've taken evidence on 5 basic qualifying issues, Welch-1 through Welch-3, and Swan Creek-1, and 2.

Welch - 1 and Welch - 2

3. Under Welch-1 we must determine whether Welch is now and was financially qualified on August 27, 1987 when they filed their application. Under Welch-2 we must determine whether Welch Communications has misrepresented to or lacked candor with the Commission regarding its financial qualifications.

4. The record shows that they were not and are not financially qualified. Originally, Charles Welch said that when he certified to Welch's finances, he was relying on: (1) a so-called loan from Broadcap; (2) a fund commitment from the Community Development Center (DC); and (3) his own personal funds.

5. But the evidence adduced shows that the Broadcap letter was merely an accommodation; the CDC fund commitment was non-existent; and he had to borrow funds from his father-in-law, and a friend in order to personally prosecute the application.

6. Moreover, under Welch-2 the evidence supports the finding that Charles Welch lacked candor with and misrepresented to the Commission regarding Welch Communications' finances. Charles Welch knew what the Commission's financial test was. He knew he was representing that Welch Communications had sufficient net liquid assets available from the committed sources to construct the Swanton FM proposal and operate it for three months without revenue.

7. At the same time Charles Welch so represented he knew that nothing firm had been set up with Broadcap. He had not given Broadcap his personal financial statement because he had no personal financial statement to give. He had nothing in writing, no estimated budget or written cost estimates to give them. And he didn't even know whether Broadcap had the required funds available to give him.

8. The only financial document Charles Welch had from CDC at the time he certified was an August 25, 1987 $26,000 resolution. But that resolution was for funds to *purchase* an FM radio station, not prosecute an FM application. In any event Charles Welch thought he was going to get more than $26,000 from CDC for the 50% equity he had given them. It ended up he didn't even get any of the $26,000. He admits that at the time he certified Welch's finances, that nothing tangible had been firmed up financially between he and CDC, and that his giving CDC a 50% equity position in Welch Communications was "an act of faith."

9. Finally Charles Welch was fully aware at the time he certified Welch's finances that he didn't have the personal wherewithal to carry out the project. In fact, he didn't even have the funds to continue the prosecution of the Swanton application. He had to borrow funds from his father-in-law and a friend in order to continue that prosecution.

10. In brief, there was no basis for Charles Welch to certify that Welch Communications had the net liquid assets available to construct and operate the Swanton station, and he knew that no such basis existed. So adverse conclusions are warranted under both Welch-1 and Welch-2. Welch Communications was not financially qualified on August 27, 1987 when Charles Welch certified they were; they are not financially qualified now; and they have continually misrepresented otherwise.

Welch - 3: Abuse of Process

11. Under Welch-3 we must determine whether Welch Communications has abused the Commission's processes by intentionally prosecuting a comparative amendment they knew contravened the Hearing Designation Order.

12. When Welch Communications filed their application on August 27, 1987, they represented that, as a stock corporation, they had two owners. Charles Welch purportedly held 50% of the stock (1500 shares) and the Community Development Corporation held the other 50% (1500 shares).

13. However, during the first hearing (FCC 90D-2 *supra*.), it developed that Welch Communications had never elected any corporate officers; that they have no-bylaws; that no corporate minutes have been taken; that no stock certificates have been issued; and that no stock subscription agreement had ever been signed. Neither Charles Welch nor CDC ever paid any money to the corporation for their respective 50% stock interests.

14. After filing their ownership representation with the Commission on August 27, 1987, Welch Communications filed nothing with the Commission during the next nine months. But in May, 1988 CDC's attorney advised CDC to pull out of the project because there was "too much at stake for them." CDC then advised Welch by telephone in May 1988 that they were withdrawing from the project. This left Welch as he puts it " . . . high and dry . . . "

15. So Welch filed an amendment with the Chief, Audio Services on June 23, 1988. There he reported that CDC had withdrawn from the project and that he (Charles Welch) was now the 100% owner. While the Chief accepted Welch's amendment for 47 CFR 1.65 reporting purposes, he noted that "an applicant may not improve its comparative position after the time for filing amendments as a matter of right has passed. Therefore any comparative advantage resulting from the amendment will be disallowed."

16. In spite of the Chief's specific admonition Charles Welch has continued to prosecute the application in his capacity as sole (100%) owner of the corporation. He has even claimed 100% quantitative integration based on the amended application. Charles Welch says that he has done so on the advice of counsel; that he expected the Trial Judge to either accept or reject his argument-not find it an abuse; that his 100% quantitative integration claim was "merely a routine legal assertion made in the context of a comparative hearing; and that he made that assertion " . . . in good faith ... "

17. It is an abuse of process for an applicant to continue to prosecute an application that he knows or has reason to know is no longer viable. That applicant has no right to squander judicial system resources in such a manner. In fact, it is his obligation not to do so. Charles Welch knew that he had lied to the Commission when he represented that the Community Development Center (CDC) owned 50% of Welch Communications Commission. So when CDC (who had never officially been a party to Welch Communications' application) left him "high and dry," Charles Welch knew that his past lies were in imminent danger of being exposed. He consulted his attorney. Lo and behold his attorney advised him to file an untimely amendment changing the ownership structure. But more than that, his attorney not only recommended that he continue prosecuting the bogus application, his counsel told him " . . . a legal argument could be made that Welch should receive 100% *quantitative* integration credit for his proposed integration into station management . . . "

18. Even so, the abuse of process issue (Welch-3) will be resolved in Welch Communications' favor. In the administrative hearing process there are few individuals who sympathize with (let alone understand) the concept of squandering judicial system resources. There are too few who can visualize the long-range administrative advantages that would accrue from keeping the hearing processes honest. In brief, this is not the type of abuse whose time has come, maybe someday. In any event, we'll look at Welch's alleged abuses as merely routine assertions made in the context of a comparative hearing.

Swan Creek - 1 and Swan Creek - 2

19. Under Swan Creek-1 we must determine whether Swan Creek is and/or was financially qualified to construct and operate their proposed Swanton facility.

20. Jerry Toth and Thomas Gardull filed their Swanton application on August 27, 1987. At that time they were financially qualified to construct and operate their Swanton proposal. They projected a total outlay for Swanton of $141,000; i.e., $108,000 in construction costs and $33,000 for three month's operating expenses (Finding 37 *supra*.).

21. To meet that $141,000 financial commitment, they had available a $125,000 loan from Jerry Toth's father (Finding 39 *supra*.), $23,000 in cash and liquid assets from Gardull (Finding 42 *supra*.) and $25,926 in cash and stock from Toth (Finding 43 *supra*.).[11] Thus, Swan Creek would have $173,926 available to meet its $141,000 commitment.

22. But Gardull and Toth apparently weren't content with just their Swanton application. Less than eight months later, on April 7, 1988, they also filed for an FM station in Lima, Ohio.[12] They later dismissed their Lima application on May 8, 1989. But the Review Board has refused to fully credit the Lima dismissal. The Board has rightly and correctly concluded (in the remand order):

> "Thus, for more than one year (between at least April 7, 1988 and May 8, 1989) when both of Swan's applications were pending before the Commission, Swan essentially concedes that it was not financially qualified to construct and operate *both* these proposed facilities. Consequently, the affirmative financial certifications contained in both applications could not have been validly operative at the same time."

23. On remand, and having had their hearing options severely curtailed, Toth and Gardull took the position that by adopting and carrying out a no-frills Lima budget, they were, in fact, financially qualified to construct and operate *both* proposals. They argue that based on a "limited budget" they could build the Lima station for $22,000 and operate for three months without revenue for $12,000. Thus, they could construct and operate *both* operations for $175,000; $141,000 for Swanton and $34,000 for Lima.

24. First, and *assuming* that Toth and Gardull could construct and operate Lima for $34,000, that would *not* have qualified them to construct and operate *both* operations. Under the Trial Judge's financial evaluation they would have $173,926 in net liquid assets available (*See* Conclusion 21) to meet a $175,000 total outlay. That's not good enough.

25. Secondly the finding must be made that Toth and Gardull could not effectuate their "no frills" Lima proposal. Both their estimated $22,000 construction costs and their $12,000 three months operating expenses are so out of touch with reality as to be classified "inherently incredible." *See Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989).

26. Even *assuming* Toth and Gardull could establish a binding oral agreement themselves and WTLW, their total dependence on *both* the WTLW technical facilities and staff renders their plan so amorphous that it cannot be credited.

27. Similarly, the Trial Judge has no intention of approving an FM operation that has no employees on the premises: no managers, no announcers, no office staff --

not even a receptionist. Nor could he credit a proposal that provides for 2 salesmen working strictly on commission from their cars.

28. Based on the foregoing (paras. 22-27 *supra.*) the preliminary conclusion is entirely justified. Swan Creek was not financially qualified to construct and operate *both* the Swanton and the Lima FM proposals starting on April 7, 1988. And since the Review Board has refused to credit the May 8, 1989 dismissal of the Lima application, Swan Creek is not now financially qualified to be a Commission licensee. Thus Issue Swan-1 must be resolved against the applicant.

29. However, Issue Swan-2; i.e., the lack-of-candor and misrepresentation issue will be resolved in Toth's and Gardull's favor. Jerry Toth frankly admitted that he and Gardull had applied for Lima as a second possibility should Swanton not be successful; that they were simply trying to cover themselves; and that they preferred Swanton over Lima. That testimony will be credited. As previously noted (Finding 33 *supra.*), the Trial Judge observed Jerry Toth's and Thomas Gardull's demeanor. He found both men creditable. They do not deserve the character stains Welch Communications has heaped upon them.

30. It was a mistake for Toth and Gardull to file for both Swanton and Lima at the same time. But the fact that they erred doesn't automatically brand them liars. There's a vast difference between a mistake and a lie. They have paid for that mistake; i.e., they have been found financially unqualified (Conclusion 28 *supra.*).[13] We needn't add insult to injury by also inappropriately branding them liars. One can be wrong and truthful at the same time.

ULTIMATE CONCLUSIONS

31. Only basic qualified applicants are entitled to a comparative analysis under the standard comparative issue. Here neither applicant is basically qualified.

32. Welch Communications has failed to demonstrate that they were financially qualified on August 27, 1987 when they filed their application; they have failed to demonstrate that they are financially qualified now; and in trying to cover up their financial (and ownership) defects, they lacked candor with and made affirmative misrepresentations to the Commission. So their application must be denied for any one of three reasons.

33. The other applicant, Swan Creek, has demonstrated that they were financially qualified on August 27, 1987 when they filed their Swanton FM application. But, some eight months later, they botched up their financial qualifications by filing an FM application for Lima. They were not financially qualified to construct and operate *both* those proposed facilities. That is because, as the Review Board has held: " . . . the affirmative financial certifications contained in both applications could not have been validly operative at the same time." So Swan Creek is not basically qualified under the financial issue (Swan-1) that has been added against them.

34. Ultimately (See FCC 90D-20 *supra.*, para. 2, Issue 2) the Commission wants us "[t]o determine, in light of the evidence addressed pursuant to the foregoing issues, which of the applications should be granted, *if any.* " (Underlining added) Which of the applications should be granted, if any? The answer is neither, and none.

SO, unless an appeal is taken from this Supplemental Initial Decision or the Commission reviews it on its own motion, Welch Communications, Inc.'s application (BPH-870827MY) IS DENIED; AND

Swan Creek Communication's application (BPH-870827NJ) IS DENIED.[14]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] The Board virtually ignored the Trial Judge's ruling on Welch's belated attempt to obtain financial issues against Swan Creek. *See* FCC 89M-1530, released May 25, 1989.

[2] The parties evidently felt that a fairly comprehensive record had been made the first time around. They were able to try all five added basic qualifying issues in one day.

[3] One of the *basic* problems in this case is that Welch has refused to prosecute its application on the relevant cut-off date ownership structure. Instead they are prosecuting their application based on a June 23, 1988 amendment -one of the amendments that the Hearing Designation Order expressly said they couldn't rely on. *See* 53 F.R. 43035 published October 25, 1988 at para. 9.

[4] Before 1987 Broadcap had no financial transactions with Charles Welch or ever lent him any money. However, back in 1985 Charles Welch tried unsuccessfully to purchase WVOI-AM, Toledo, Ohio. At that time he did have some informal discussions with Broadcap, but nothing came of them.

[5] The closest CDC came to getting involved financially was in February, 1988 -- some six months after the application was filed. They obtained an equipment proposal from the Harris Corporation.

[6] Under Commission precedent Welch couldn't obtain any comparative advantage from their untimely amendment. But, in addition, they were also charged with any comparative deterioration resulting from that amendment. *See WTAR Radio - TV Corporation et al*, 48 FCC 2d 1147 (1974). This meant that by voluntarily amending CDC out of the Swanton application, Welch lost 50% of its claimed quantitative integration.

[7] Toth and Gardull filed their Swan Creek application on August 27, 1987. They filed for a new FM station at Lima on April 7, 1988 (Tr. 846).

[8] Surely Gardull was aware that the Review Board doesn't look kindly on applicants who can put radio stations on the air for a small amount of money. *See Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989). In fact under the existing financial guidelines, as implemented by the Review Board, only the well-to-do need apply. The days of the struggling entrepreneur are long gone.

[9] By comparison, for its Swanton operation, Swan Creek would employ five announcers and one office clerk. There would be two salesmen working on commission with a minimum wage guarantee, and two managers (Toth and Gardull) on the premises.

[10] The possibility does exist that the Review Board will reject the basic qualifying conclusions that flow from both Findings 7-26 *supra.* (Welch Communications), and Findings 27-47 *supra* If they do they may wish to fall back on the comparative

conclusions in FCC 90-20 *supra.*, Conclusions 1-10. But from the way the Review Board has structured the remand order, this is unlikely.

[11] The Trial Judge assumes that the stock is sufficiently liquid, and therefore can be credited.

[12] Swan Creek had a 1980 population of 3,424. The community lies far enough west of Toledo, Ohio that, at best, it could only be considered part of the Toledo market. Lima, Ohio had a 1980 population of 47,381.

[13] This is a far cry from numerous other situations where the Commission and its staff have blinked; *e.g.* where an applicant has filed ten or more applications apparently using the same source of financing. Here we have an applicant who applied separately for two communities and honestly intended one of those applications (Lima) to be a back-up. Let them pay the price for their honesty. But we needn't place a character blot on their record.

[14] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-360

In the Matter of

Regulation of International Common Carrier Services — RM 7578

NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 1991; Released: January 10, 1992

Comment Date: February 26, 1992
Reply Comment Date: March 17, 1992

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. We initiate this proceeding to consider modifications to the policy adopted in our 1985 *International Competitive Carrier* decision regarding regulation of "foreign-owned" U.S. common carriers in their provision of international service.[1] Our decision to initiate this notice of proposed rulemaking is in response to a petition for rulemaking filed by Cable and Wireless Communications, Inc. (C&W) seeking changes to the 1985 foreign ownership policies.[2] C&W asks this Commission to limit dominant carrier regulation of foreign-owned U.S. carriers to those routes where the carrier's foreign affiliate is the dominant provider of international services.

2. We propose to modify the current policy that treats "foreign-owned" U.S. common carriers as dominant in their provision of all international services to all foreign markets in favor of a policy that regulates U.S. international carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliates have the ability to discriminate against non-affiliated U.S. international carriers in the provision of access to bottleneck facilities and services. In modifying the international competitive carrier policy with regard to "foreign-owned" carriers, we do not at this time propose to change other components of our 1985 decision.

II. BACKGROUND

A. Existing Policy

3. In our *International Competitive Carrier* decision, we concluded that we should lessen the burdens of traditional entry and pricing regulation for those international common carriers that faced effective marketplace competition and did not have market power.[3] To assess whether effective competition existed and to determine which carriers continued to have market power, we divided the service offerings into product and geographic markets. For regulatory purposes, we concluded that there are two product markets: 1) international message telephone service, or IMTS, and 2) non-IMTS, or telex, telegraph, private line and other services.[4] Also, we determined that each foreign country was a distinct geographic market. We adopted this country-by-country approach to geographic markets because we found that the requirement to obtain an operating agreement from each country served as a potential competitive barrier.

4. Within the IMTS market, we found that AT&T had market power and was therefore dominant, that is, had the ability to control the price that could be charged for IMTS, primarily because of its market share.[5] We also found certain offshore providers (i.e., in Hawaii, Guam) to be dominant because of their control of bottleneck facilities. By contrast, the carriers providing non-IMTS, including AT&T, were found to be nondominant in their provision of such services, given the competitive nature of the non-IMTS market.[6]

5. In addition, we determined that, because of its ability and incentive to operate in concert with its foreign parent, a foreign-owned U.S. carrier could deny its competitors access to foreign markets or discriminate in the terms of access. We concluded that the most efficient way to encourage the granting of operating agreements and to discourage market distortions was to classify all foreign-owned U.S. carriers as dominant in their provision of all international common carrier services to all foreign points.[7]

---

[1] *International Competitive Carrier*, 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. (P&F) 2d 1435 (1986).

[2] Cable and Wireless Communications, Inc., Petition for Rulemaking to Modify the Commission's Regulation of International Common Carrier Services Provided by Foreign-Owned U.S. Common Carriers, filed December 3, 1990.

[3] *International Competitive Carrier*, 102 F.C.C. 2d at 821.

[4] We adopted this IMTS/non-IMTS dichotomy after analyzing demand and supply substitutability factors. We noted that the lack of entry barriers is a key to supply substitutability and found that the most significant entry barrier in international communications is the requirement that U.S. carriers obtain an operating agreement from the foreign administration. We found this barrier less relevant for non-IMTS, because the number and nature of existing agreements indicated that it was easier to obtain agreements for non-IMTS than for IMTS services. 100 F.C.C. 2d at 828.

[5] Under traditional antitrust analysis, market power is the ability to control prices or exclude competition. Factors indicative of the ability to control price have included market share, control of facilities, and the lack of actual or potential competition.

[6] In addition to our division of international services into two product markets, IMTS and non-IMTS, we also identified three service products that, in 1985, were provided solely by Comsat: multi-purpose earth stations, television services, and space segment. We found Comsat to be dominant in its provision of these services. 102 F.C.C. 2d at 838-40.

[7] 102 F.C.C. 2d at 842. We provided for a waiver process by which we could grant non-dominant status on a particular route or for a particular foreign-owned U.S. carrier for good public policy reasons. *Id.* at n.74.

6. We defined as foreign-owned any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of the foreign telecommunications entity sits.[8] In a subsequent action, we defined a foreign telecommunications entity as including a telecommunications or telecommunication-related equipment manufacturer, equipment supplier, or service provider.[9]

7. Pursuant to the 1985 policy, foreign-owned U.S. carriers remain subject to traditional entry and price regulation. Thus, unlike their nondominant competitors, foreign-owned U.S. carriers must file a Section 214 application for all circuits they seek to acquire. They must cost support their tariff filings and implement these filings only after the longer dominant carrier notice periods. Additionally, they must report quarterly on their traffic and revenues, in addition to the annual reports required generally of all international carriers.

8. By comparison, nondominant providers of international common carrier services are subject to streamlined facility and tariff regulation.[10] In particular, a nondominant carrier may make its tariffs effective on shorter notice periods, is not subject to the requirement that tariffs be cost supported, and its tariffs are presumptively legal. Further, under streamlined regulation, once a carrier obtains initial Commission certification to provide a particular service to a specific country that carrier is not required to file further applications to add circuits or change facilities to provide services within that same product market to serve that country. Instead, it must file semi-annual reports listing the capacity it has added to that previously authorized by the Commission.

B. C&W Petition

9. On December 3, 1990, C&W, a foreign-owned U.S. common carrier,[11] filed a petition for rulemaking asking this Commission to revisit the *International Competitive Carrier* decision and limit dominant regulation of foreign-owned U.S. carriers to those routes where the carrier's foreign affiliate is the dominant provider of international services. C&W observes that, since the Commission adopted its 1985 foreign-owned carrier policy, U.S. service providers have made great progress in securing operating agreements with foreign administrations and the opportunity for U.S. firms to participate in telecommunications businesses has increased markedly around the world.

10. C&W states that the 1985 policy has had an anticompetitive effect on foreign-owned U.S. carriers by inhibiting the firms' ability to provide U.S. consumers competitive international services with the speed and flexibility required in the marketplace. In particular, C&W observes that the limitations placed on its Section 214 authorizations require C&W repeatedly to return for additional authorizations for insignificant changes in service offerings.[12] In the tariff area, C&W states that the delays inherent in filing tariffs on longer notice periods, even where the foreign-owned U.S. carrier simply is reselling a nondominant carrier's tariff offerings, penalizes foreign-owned U.S. carriers in the marketplace.

11. C&W asserts that a foreign correspondent's ability to damage competition or to treat U.S. carriers inequitably requires, first, a presence in the foreign market and, second, a dominant presence. C&W contends that its proposal would eliminate the overbreadth of the existing policy that applies on all routes, even where the foreign-owned U.S. carrier's parent or affiliate has no dominant presence in the foreign point, while retaining sufficient regulatory flexibility to protect the interests of U.S. ratepayers and business enterprises.

12. C&W's petition was placed on public notice, with comments and reply comments filed, respectively, on January 28, 1991 and February 12, 1991. Eight parties supported the proposal to initiate a rulemaking and six parties opposed C&W's petition. Those parties supporting C&W's proposal are the British Embassy, C&W, ComSystems, IDB, LiTel, McCaw, the U.S. Department of Treasury and Worldcom. Those opposing C&W's petition are AT&T, BT, Comsat, MCI, PanAmSat and Sprint.

C. Comments

13. The parties opposing C&W's petition argue that the 1985 foreign-owned carrier policy continues to have validity because foreign-owned U.S. carriers have the ability to inhibit U.S. carriers' access to foreign markets. They oppose limiting the foreign-owned carrier policy only to those carriers affiliated with foreign telecommunications entities that are dominant in a foreign market. Noting that since the adoption of the foreign-owned carrier policy the Commission has identified other issues regarding arrangements between U.S. carriers and their foreign correspondents, AT&T suggests that a foreign telecommunications entity, even where it has a limited market position in the foreign market, may impede the development of

---

[8] *Id.* at n.74. A number of U.S. carriers have been classified as dominant in their provision of international common carrier services pursuant to the foreign-owned carrier provision of International Competitive Carrier. These include C&W (formerly TDX), 102 F.C.C. 2d at 842 n.75; Worldcom, 4 FCC Rcd. 2219 (CCB 1989); IDB, Letter to R. Koppel from Chief, International Facilities Division, File No. CSG 90-015-AL, Dec. 21, 1989; ComSystems, 5 FCC Rcd. 696 (CCB 1990); Fondo Unimex, 4 FCC Rcd. 8185 (CCB 1989) and Gimex, 4 FCC Rcd. 4522 (CCB 1989).

[9] *Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry*, FCC 88-71 (released March 25, 1988) at 43 n.74.

[10] Unlike the Commission's decisions in its domestic Competitive Carrier proceeding, which adopted a regulatory regime of forbearance for nondominant service and facility providers, the Commission's decision in *International Competitive Carrier* adopted streamlined entry and tariff regulation of nondominant international carriers. Streamlined regulation requires international common carriers to file Section 214 applications for initial certification that provision of a particular service to a specific country is in the public interest. Streamlined regulation, unlike forbearance, also requires that international common carriers file tariffs setting forth the rates and terms of their international service offerings.

[11] C&W is a wholly-owned U.S. subsidiary of Cable and Wireless North America, which itself is a wholly-owned U.S. subsidiary of Cable and Wireless PLC of the United Kingdom. Cable and Wireless PLC provides communications services to customers through its subsidiaries in the U.S., U.K., Hong Kong and other geographic markets.

[12] For example, C&W states that its Section 214 authorizations to offer resale services were limited to resale of the underlying carrier tariffs that existed at the time of C&W's Section 214 authorization, and to the points then listed in those underlying tariffs.

competition through interconnection, return traffic, settlements and other arrangements favoring its U.S. affiliate. AT&T states that these concerns may be relevant in determining whether an individual foreign-owned U.S. carrier should be regulated as dominant for its provision of international services. BT argues that the Commission should not assess whether a foreign-owned U.S. carrier's foreign affiliate is dominant in a foreign market, but should determine whether a particular foreign market is open. BT contends that the Commission should exempt all foreign owned U.S. carriers affiliated with U.K. firms from the dominant classification given the openness of the U.K. market.

14. The parties opposing C&W's petition also contend that the foreign-owned carrier policy should not be limited only to the home market of the foreign telecommunications entity. They suggest that a foreign telecommunications entity may affect the development of competition in third countries where it has no market presence by exercising influence over other telecommunications administrations with which it provides international services. Further, they contend that non-dominant regulation would not afford the Commission the comparable monitoring capability, timely and detailed information, and regulatory leverage that they contend is essential to assuring fairness and reciprocity in the treatment of U.S. carriers in foreign markets. PanAmSat states, for example, that the relevant fact for reciprocity purposes is not whether a foreign-owned U.S. carrier is dominant in particular markets abroad, but rather that the foreign-owned U.S. carrier is taking advantage of the openness of the U.S. market while benefitting from closed markets elsewhere.

15. Parties opposing C&W's petition also contend that the Commission is not equipped to assess the competitiveness of foreign markets. They state that the C&W proposal would require the Commission to investigate a wide variety of factors, would be immensely complicated, and would not be a productive use of the Commission's limited resources. They also state that supporters of C&W's petition fail to demonstrate that the burdens of dominant carrier regulation are so onerous as to handicap foreign-owned U.S. carriers from competing effectively with U.S.-owned carriers. Thus, they favor retention of dominant status for foreign-owned U.S. carriers. Also, they observe that any of the foreign-owned U.S. carriers supporting C&W's petition are free under current policy to file a request for a waiver.

16. Those parties supporting C&W's proposal assert that the current foreign-owned carrier policy should be changed because it is overbroad in scope and burdensome on foreign-owned U.S. carriers. In particular, supporters claim that the definition of a "foreign telecommunications entity" should be narrowed so as not to include equipment manufacturers or suppliers but to be limited to foreign service providers that have the ability to influence reciprocal entry of U.S. carriers into the foreign market. Supporters also urge that the current policy be tailored to apply only on those geographic routes where the U.S. carrier's foreign affiliate is dominant in the provision of international services from the foreign point.

17. In addition, ComSystems and McCaw urge the Commission to exempt resellers from the reach of the foreign-owned carrier policy, because resellers' international offerings are based on service they take from unaffiliated U.S. facilities-based carriers and not on any correspondent relationship. Worldcom and McCaw question the fifteen percent foreign ownership benchmark in that it treats U.S. carriers with non-controlling foreign investors as though they were wholly-owned by foreign interests. Worldcom would establish a 50 percent foreign ownership benchmark for control; McCaw suggests that the foreign-owned carrier policy should not classify U.S. carriers as dominant where the non-U.S. ownership is non-controlling and consistent with Section 310(b) of the Communications Act, 47 U.S.C. Section 310(b).

18. The U.S. Department of the Treasury observes that the foreign-owned carrier policy, with differential treatment of foreign-owned firms in the U.S., has implications for U.S. foreign investment policy. Citing the Economic Report of the President,[13] seeking to reduce existing barriers to international investment throughout the world, Treasury states that more onerous regulatory requirements should not be placed on foreign-owned carriers unless and to the extent this differential treatment clearly can be justified by well-defined competition policy concerns. LiTel states that the foreign-owned carrier policy is contrary to U.S. trade policies, including the principles of national treatment and nondiscrimination. The British Embassy observes that the effects of the current regulatory framework in the United States will be the subject of further consideration by the British Government in the context of the decision it will be taking about whether to permit international simple resale. The British Embassy states that, before deciding to authorize international simple resale between the U.K. and the U.S., the British Government would need to be assured that the practical application of Section 214 did not place British-owned entities at a disadvantage as compared with U.S.-owned companies.

19. LiTel also comments that the foreign-owned carrier policy is not based on a factual record of documented discrimination against U.S. carriers in foreign markets, but on mere speculation and conjecture. LiTel observes that the Commission proposed to find carriers dominant even though they lacked market power. It further observes that the Commission, in 1985, stated that it was not equipped to consider the domestic markets of foreign countries and therefore contends the Commission did not know whether the problem to which its policy was directed even existed.

20. Finally, Worldcom and ComSystems observe that their petitions, under the current waiver procedure, for a declaratory ruling that they are non-dominant or a waiver of the dominant carrier rules, have been pending, respectively, since August 22, 1989 and June 11, 1990.

III. DISCUSSION

21. In 1985, when we adopted the *International Competitive Carrier* decision, the U.S. market for international telecommunications services already had experienced rapid growth and substantial transformation in terms of new

[13] Economic Report of the President, Transmitted to Congress February 1990 (U.S. Government Printing Office 1990).

carriers and new services.[14] In addition, we had recently adopted a number of decisions designed to provide a greater range of service and facility options for customers and carriers.[15] We therefore concluded that we should lessen the burdens of regulation for those international service and facility providers that faced effective marketplace competition and did not have market power.

22. Our concerns with foreign-owned carriers, however, went beyond the question of market power.[16] We were concerned that a U.S. carrier owned by a foreign telecommunications entity might operate together with its foreign affiliate to deny nonaffiliated U.S. competitors operating agreements or to discriminate against other carriers in terms of access. The ability to foreclose or impede access to a foreign market resulted from the traditional monopoly status of the state-owned foreign administrations that served as the foreign correspondents for bilateral arrangements with U.S. telecommunications firms.[17] The incentive to discriminate in favor of its U.S. affiliate resulted from the foreign telecommunications entity's non-passive financial investment interest in the U.S. affiliate.[18] Because of these concerns, we concluded that imposition of dominant status for foreign-owned U.S. carriers in their provision of international services would encourage affiliated foreign telecommunications entities to grant operating agreements to non-affiliated U.S. carriers and would discourage market entry restrictions, such as unequal interconnection and other forms of discrimination against non-affiliated U.S. carriers.[19]

23. *Basis for modifying policy.* Since our adoption of this policy U.S. carriers have been increasingly successful in obtaining operating agreements for IMTS service. In 1985 only six of the top twenty markets in 1985 were open to competitive provision of IMTS by U.S. carriers.[20] AT&T was the only IMTS provider to most countries. For example, in the top twenty IMTS markets, AT&T was the sole IMTS provider for West Germany, Japan, Korea, France, the Philippines, Italy, Colombia, the Dominican Republic, Israel, Jamaica, Switzerland, India, El Salvador and the Netherlands.[21] Now, multiple U.S. carriers have acquired operating agreements to provide IMTS to many countries, including all but one of the top twenty markets. US Sprint and MCI have direct operating agreements with at least 39 and 78 countries respectively, and there has been a corresponding increase in the market shares of these carriers. While AT&T continues to maintain the largest shares of these markets, the trend has been toward growth by other carriers.

24. Additionally, during the same time period, some foreign administrations have begun to privatize their telecommunications properties, to open telecommunications services markets to entry by new providers and to take other steps to make their markets more competitive for the provision of telecommunications services. In this context we note the 1990 study of the Department of Commerce which observed that "... telecommunications has become a global industry, and national telecommunications networks, faced with pressures beyond their control, are no longer guaranteed the luxury of existing as "insular monopoly entities."[22] The report states that, "[T]he result of these pressures has been a gradual movement toward the easing of monopolies and a shift toward increased competition in the provision of telecommunications equipment and services in a number of countries around the world."[23]

25. As a result of these market changes, we tentatively conclude that the emphasis of the current foreign-owned carrier policy is no longer appropriate. While we remain concerned about the potential for preferential treatment that may be accorded U.S. carriers by their affiliates in foreign markets, we believe that the current policy can be modified in light of the progress that has been made to date by U.S. carriers in obtaining operating agreements and our desire to encourage further market openings in other countries. Our major continuing concern is that international carriers not be in a position to impede competition for U.S. international communications through discriminatory use of bottleneck facilities. We propose therefore to change our policy from one that imposes dominant carrier regulation based only on the existence of an ownership affiliation between U.S. and foreign telecommunications entities to one that imposes dominant regulation on U.S. international carriers only on those routes where there is a substantial possibility of anticompetitive effects on the U.S. international service market.

---

[14] *International Competitive Carrier*, 102 F.C.C. 2d at 820.

[15] *Id.* at 821. These included *Authorized User*, 100 F.C.C. 2d 177 (1985), *aff'd*, 804 F.2d 1280 (D.C. Cir. 1986)(allowing non-common carriers to lease Intelsat capacity directly from Comsat and permitting Comsat, through a separate subsidiary, to provide end-to-end services), *Modification of Policy on Ownership and Operating of U.S. Earth Stations that Operate with the Intelsat Global Communications Satellite System*, 100 F.C.C. 2d 250 (1984)(providing for the independent ownership of international earth stations), *Establishment of Satellite Systems Providing International Communications*, 101 F.C.C. 2d 1046 (1985)(permitting international communications satellite systems separate from the Intelsat system), and *TelOptik, Ltd.*, 100 F.C.C. 2d 1033 (1985)(permitting private, noncommon carrier transoceanic submarine cables).

[16] *International Competitive Carrier*, Notice of Proposed Rulemaking, FCC 85-177 (released April 19, 1985) at 16 n.35 (although foreign-owned U.S. carriers might not have market power, concern that they might operate in concert with their foreign parents).

[17] 102 F.C.C. 2d at 828.

[18] *See* 60 Rad. Reg. 2d (P&F) 1435, 1441-42 (1986); 102 F.C.C. 2d at 842 n.74.

[19] In this regard, we provided for a process in which waivers may be granted in instances in which large investments are passive and for other good public policy reasons. We said that this waiver policy would be applied under our public interest standard on a carrier-by-carrier or country-by-country basis. *See* 102 F.C.C. 2d at 842 n.74.

[20] Even in those markets, AT&T in 1985 was the overwhelming U.S. service provider, and the market shares of the additional IMTS providers were negligible.

[21] Trends in the International Communications Industry, 1975-1990, Federal Communications Commission (Industry Analysis Division, October 4, 1991)(hereinafter, Trends) at 30.

[22] U.S. Telecommunications in a Global Economy: Competitiveness at a Crossroads, Department of Commerce (August 1990) at p. 72.

[23] *Id.* The Department of Commerce report contains discussion of the changing regulatory policies in a number of different countries.

26. The ability to inhibit U.S. carrier competition to any particular foreign market or to treat U.S. carriers inequitably primarily arises from the ability of the affiliated correspondent in that foreign market to discriminate against non-affiliated U.S. carriers in terms of operating agreements and access to bottleneck facilities. Our current policy of encompassing routes where the affiliated correspondent may not have this ability results in unnecessary application of Commission regulation, particularly now when the concerns that caused the Commission to adopt the foreign-owned carrier policy in 1985 have been addressed in many markets.

27. Moreover, we note that U.S. companies have made significant telecommunications investments in other countries over the past several years. We are encouraged by their progress and observe that, in some instances, these investments have resulted in U.S. companies acquiring control of bottleneck facilities in foreign markets. To the extent that we are concerned with the ability of a foreign affiliate to deny IMTS operating agreements to non-affiliated U.S. carriers and to discriminate against such carriers in the terms of access, these same concerns apply when a U.S.-owned company acquires foreign bottleneck facilities and also is affiliated with a U.S. carrier in its provision of international services from the United States.

28. *Emphasis on Discriminatory Use of Bottleneck Facilities.* We propose therefore to modify the 1985 foreign-owned carrier policy in favor of a policy that regulates U.S. carriers, whether U.S.- or foreign-owned, as dominant only to those countries where the U.S. carrier's affiliate has the ability to discriminate against non-affiliated U.S. carriers in their provision of international services. This proposed policy would not change the dominant classification of AT&T, Comsat and other carriers that are dominant under other provisions of our 1985 decision. We will not consider in this proceeding the overall competitiveness of IMTS. As we stated in our *Report and Order* in CC Docket No. 90-132, we believe that this question is more appropriately treated as a separate matter.[24] Similarly, we do not propose to consider in this proceeding our regulation of Comsat, which continues to be the sole provider of INTELSAT and Inmarsat space segment in the United States.

29. We tentatively conclude that traditional Title II rate and entry regulation of U.S. international carriers is warranted only for those routes where the U.S. international carrier's affiliate has the ability to discriminate through control of bottleneck services or facilities in a foreign market. There are two steps in identifying "bottleneck services and facilities." First, we must identify the types of services and facilities that a U.S. international carrier's affiliate potentially could use to discriminate among competing U.S. carriers in the foreign market. Second, we must identify the circumstances that would warrant the conclusion that the affiliate has bottleneck control, *i.e.*, market power, in the provision of such services and facilities.

30. Turning to the first step, we propose to include only those types of facilities and services that the Commission regulates as common carriage in the United States and that also are used to deliver U.S. international traffic into a foreign market. By taking this approach, we intend to exclude from our definition the provision or manufacture of: private cable and satellite services and facilities; cable television services and facilities; and the hardware and software components that support the telecommunications infrastructure. We intend to include international services and facilities, up to and including the international switch, that are required to deliver U.S. international traffic into the foreign market.[25] We request comment on this approach.

31. In reaching this tentative conclusion, we agree with and have sought to accommodate the concerns of those parties that support applying dominant carrier regulation only to affiliates of those telecommunications providers that may have the ability to influence reciprocal entry of non-affiliated U.S. carriers into a foreign market.[26] We also have sought to avoid, to the extent possible, difficulties associated with identifying bottleneck services and facilities in the context of a foreign market infrastructure. We recognize that some parties believe we should include the intercity and local access services and facilities that are used to both originate and terminate U.S. international services in foreign markets.[27] Other parties counter, however, that by taking such a broad view, the Commission could inhibit further liberalization in other countries through, for example, the implementation of international resale. We therefore request comment on whether to extend the definition of bottleneck facilities and services beyond the international switch.

32. The second task involved in defining "bottleneck services and facilities" is identifying the circumstances that would warrant the conclusion that a U.S. carrier's affiliate has bottleneck control in a foreign market, *i.e.*, market power in the provision of services and facilities that could be used to discriminate among competing U.S. international carriers. We tentatively conclude that the definition of "bottleneck control" should include the existence of a legally protected monopoly or a monopoly in fact for the provision of the telecommunications services and facilities discussed above. Under such a definition, we would regulate as dominant any U.S. international carrier on any route where its affiliate enjoys this degree of market power in the provision of such services and facilities. At the same time, based on our experience in the United States, we believe it is appropriate to recognize the efficacy of regulatory policy in controlling the ability of a carrier to engage in discrimination through control of

---

[24] *See* Competition in the Interstate Interexchange Marketplace, FCC 91-251 (released September 16, 1991) at para. 161, where we found that there was insufficient evidence on the record on which to draw definitive conclusions about the competitiveness of IMTS. We said that we could not reach definitive conclusions on this matter until we received additional information.

[25] The provision of such international facilities and services may involve, for example, issuance of operating agreements permitting entry into a market; owning or leasing half-circuits in submarine cables and INTELSAT satellite facilities; operating such facilities to originate international telephone or telegraph service from end users in the foreign market and terminate in-bound traffic from foreign correspondents; and making available for resale such facilities to non-facilities-based carriers for the origination or termination of international traffic.

[26] *See supra* paras. 16 and 30.

[27] For example, a U.S.-based carrier may need to obtain from a non-affiliated carrier the foreign half-circuits and dedicated access facilities to its customers' foreign premises.

bottleneck services and facilities. Therefore, where the traditional monopoly found in most countries for telecommunications has been eliminated or placed under effective public regulation, we would place the burden on the U.S. carrier to demonstrate that its affiliate no longer controls bottleneck facilities in that market or that its affiliate otherwise no longer has the ability to discriminate against non-affiliated U.S. carriers. The progress of the United Kingdom and Japan, for example, in liberalizing their telecommunications markets might be part of a showing a carrier may make in seeking to meet the requirements we propose.

33. We would anticipate that the incumbent provider of telecommunications services and facilities in the foreign market may face only limited competition, at least initially, from new entrants. To make the non-discrimination showing we propose, the incumbent's U.S. affiliate may demonstrate that the foreign market for the incumbent's services and facilities is open and competitive; that is, that it does not have market power in the relevant market segment. Alternatively, the incumbent's U.S. affiliate may demonstrate the existence of a legal and regulatory structure that effectively prevents discrimination against non-affiliated U.S. carriers.[28] We request comment on these proposals, and on other means of analysis and relevant factors that should be addressed.

34. As a final matter, we propose to apply our modified policy to U.S. facilities-based carriers and resale carriers alike. Concurrent with the adoption of this Notice of Proposed Rulemaking, we have adopted a Report and Order in CC Docket No. 90-337[29] under which we may authorize the resale of international private lines for the provision of basic telecommunications services. Resellers also may continue their practice of reselling a carrier's international message telephone service (IMTS), and they may choose to supplement their operations through the acquisition of facilities. We believe it would be difficult to distinguish a carrier's regulatory status for purposes of this proceeding based on the means by which it provides U.S. international service. Commenters addressing our proposal to treat facilities-based and resale carriers alike may wish additionally to discuss the potential for discrimination by a foreign telecommunications provider in favor of an affiliated U.S. carrier that is merely reselling IMTS.

35. *Definition of Affiliate.* For purposes of implementing this proposed policy, we propose to define an affiliate as any entity that controls, is controlled by, or is under common control with a provider of telecommunications services or facilities in a foreign market. Given the variety of ownership structures presented by public and private corporations, partnerships and joint ventures, it has been this Commission's experience that control must be assessed on a case-by-case basis.[30] Therefore, rather than rely on a specific ownership percentage benchmark to define control, we propose to rely in the first instance on the submission of certifications and ownership information by applicants seeking carrier authorization under Section 214. We would require that each Section 214 applicant certify to this Commission, under Part 63 of the Rules, that it is not affiliated, as defined above, with a provider of telecommunications services or facilities in the country to which it seeks to provide service. Any applicant unable to make such a certification would be regulated as dominant for U.S. international service to that country unless it could demonstrate in its application that its affiliate does not have the ability to discriminate through control of bottleneck facilities or services against non-affiliated U.S. international carriers.

36. Under this proposal, we additionally would require that each applicant provide the name, address, citizenship, and principal businesses of its principal stockholders or other equity holders,[31] and that each applicant identify any interlocking directorates. We believe this information would enable the Commission, and other interested parties, to ascertain whether a substantial question of fact exists as to the certification given by the applicant.[32]

37. The definition of affiliate that we propose focuses on a U.S. international carrier's relationship with an individual telecommunications provider in a foreign market. As an alternative to this approach, we request comment on whether the public interest requires that we consider, in defining affiliation, levels of ownership that may, either standing alone, or, when combined with other ownership interests, constitute the substantial ability to influence the affairs of a company. Under this alternative approach, we could require that applicants provide the same general ownership information specified above but require that they certify that, collectively, 50 percent or more of their equity is not owned of record by, or for the benefit of, one or more providers of foreign telecommuni-

---

[28] Similarly, C&W could submit a showing to the Commission to change its regulatory status to the United Kingdom. C&W could argue, as it does in its petition, that Mercury Communications does not now control, and has never controlled, bottleneck facilities in the United Kingdom, or that Mercury does not otherwise have the ability to discriminate against non-affiliated U.S. international carriers. We may address the merits of such arguments in this proceeding. We necessarily would do so in response to a petition for declaratory ruling or in the context of a Section 214 application.

[29] *Regulation of International Accounting Rates, Phase II*, FCC 91-401, adopted December 12, 1991.

[30] Commission licensees and permittees, as well as applicants seeking authorization under Titles II and III of the Communications Act, are regularly engaged in making assessments of control in order to avoid violations of Sections 310(d) and 214(a) of the Act. Moreover, FCC Form 430 currently requires that Title III common carriers certify whether a corporate licensee is directly or indirectly controlled by any other corporation. We intend that applicants for Section 214 authorization prepare the certifications proposed here consistent with Commission case law on control. *See, e.g., Rochester Tel. Corp. v. United States*, 23 F. Supp. 634, 636 (W. D. N. Y. 1938), *aff'd*, 307 U.S. 125 (1939)(definition encompasses every form of control, actual or legal, direct or indirect, negative or affirmative). *See also Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951); *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1963); *Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843, 848 (1985); *William S. Paley*, 1 FCC Rcd 1025 (1986), *recon. denied*, 2 FCC Rcd 2274 (1987), *aff'd sub nom. Fairness in Media v. FCC*, 851 F.2d 1500 (D.C. Cir.) (per curiam), *cert. denied*, 488 U.S. 893 (1988).

[31] FCC Form 430," Common Carrier and Satellite Radio Licensee Qualification Report," requires the submission of similar information.

[32] Should there be instances of collusion in favor of a U.S. international carrier that is owned, in part, by providers of

cations services or facilities.[33] Where the applicant cannot make the required certification, we would regulate it as dominant in its provision of U.S. international service to each market for which the applicant cannot demonstrate that such a provider does not have the ability to discriminate against non-affiliated U.S. carriers through the control of bottleneck facilities.

38. Although we tentatively conclude that control is the proper standard for triggering a cognizable affiliation with providers of telecommunications services or facilities, we request comment on another alternative approach. Commenters are invited to address whether the public interest requires that we also focus on substantial ownership or management interests that may fall short of control. Our current ownership "benchmark," for example, is 15 percent.[34] Commenters therefore may address whether, where the ownership or management interest (i.e., participation on the Board of Directors) of a telecommunications provider in a foreign market reaches a given level that may fall short of control, we should nonetheless require the carrier to demonstrate that the provider does not have the ability to discriminate in its home market against non-affiliated U.S. carriers. Commenters also should address whether we should raise the current 15 percent benchmark as a more relevant standard for the concerns addressed in this Notice.[35]

39. *Other Considerations.* We request comment on the effect of our proposal on U.S. carriers not currently classified as dominant that are affiliated with telecommunications providers in a foreign market. We additionally invite parties to comment on the potential for a telecommunications provider to leverage its foreign market bottleneck into other markets where it has no bottleneck control.[36] For example, would a country grant favorable treatment to a U.S. carrier because it is able to obtain from the affiliate of the U.S. carrier a favorable accounting rate to another country? We request comment on whether there is a substantial possibility of such behavior occurring and, if so, whether it could be offset by requiring that a U.S. carrier regulated as dominant for one international route file for all routes served the quarterly traffic reports presently imposed on foreign-owned carriers. Similarly, where a U.S. carrier or its affiliate enters into an agreement (other than a standard operating agreement) with other carriers that have the ability to discriminate among U.S. carriers through control of bottleneck facilities in other countries, and such an agreement affects traffic flows to or from the United States, should we impose dominant-carrier regulation on the U.S. carrier for those points that are subject to the agreement? If dominant regulation is deemed appropriate, in these circumstances, how would it be implemented?

40. *Public Benefits.* We believe that the modified policy proposed here is consistent with the overall goals of the Commission in encouraging competition. The proposed approach also would avoid the appearance of unequal treatment of foreign-owned carriers because dominant status on specific routes would not be based on the foreign ownership of the U.S. carrier but on the bottleneck control of the carrier's affiliate in the foreign market. By refocusing on those routes where the foreign affiliate has bottleneck control, we believe it would continue to promote the 1985 policy objective of fostering multiple operating agreements and protecting other U.S. carriers from discriminatory treatment. Additionally, for those routes where we are able to move to streamlined regulation of U.S. carriers currently treated as dominant under the foreign-owned U.S. carrier policy, the same benefits that accrued to U.S. consumers from our streamlining six years ago will redound to U.S. consumers from our streamlining of foreign-owned U.S. carriers on those routes where we no longer need to apply dominant carrier regulation. Finally, we request comment on whether our proposed policy will be more conducive to foreign capital investment in U.S. industry that may be in the public interest.[37]

41. *Filing requirements.* As discussed in paragraph 35 above, we propose to amend Part 63 of our Rules to require each applicant for Section 214 authority to provide international common carrier services to certify that it is not affiliated with a telecommunications facilities or service provider in the country to which it seeks to provide service. We also propose to amend Part 43 of our Rules to require all authorized U.S. international carriers affiliated with providers of telecommunications facilities and services in a foreign market to provide a list of such affiliations within ninety days of the release date of the Report and Order adopted in this proceeding. Also, we propose to require any authorized international carrier that subsequently becomes affiliated with a facilities or service provider in a foreign market to notify the Commission within 90 days of the transaction.

---

international telecommunications facilities and services in several countries, we shall take whatever steps are necessary to address such collusion.

[33] We request comment how best to assess the collective influence of the U.S. carrier's Board of Directors and to use such an assessment in drafting our affiliation rules.

[34] *See supra* para. 6.

[35] Commenters also should address whether we should adopt a higher management benchmark. The current standard imposes dominant carrier regulation on a U.S. carrier in its provision of international common carrier services when only one of its directors is a representative of a foreign telecommunications entity. *See supra* para. 6.

[36] *See supra* para. 14.

[37] We note the 1991 Economic Report of the President observes that," [f]oreign direct investment in the United States is a sign of strength in the economy. .. and of the increasing internationalization of the economy through which U.S. firms will be strengthened and made more competitive. This investment and the global orientation of companies benefit the United States. The unhindered flow of foreign direct investment leads to additional productive resources in the United States and facilitates the realization of cost-efficient scales of business by consolidating under one corporate roof separate, but related, operations. .. [which] boost the productivity and international competitiveness of the United States, create jobs, and promote innovation and productivity. The inflow of foreign capital helps to sustain U.S. investment ... and thus contributes to economic growth." Economic Report of the President, Transmitted to the Congress February 1991 (U.S. Government Printing Office 1991) at 258. *"The benefits engendered by the global production and trade networks of modern multinational corporations point to the undesirability of devising policies aimed at restricting foreign investment." Id.* at 261 (emphasis in original)." The Administration supports maintaining an open foreign investment policy, with limited exceptions related to national security. This policy produces the greatest possible national benefits from all investments made in the U.S. economy. The United States has long recognized that unhindered international investment is beneficial to all nations, that it is a 'positive sum game.'" *Id.* at 262.

IV. CONCLUSION

42. In this *Notice of Proposed Rulemaking* we tentatively conclude that the U.S. public interest requires that we modify the competitive carrier policy as it relates to "foreign ownership" of U.S. carriers we adopted in our 1985 *International Competitive Carrier* decision. Therefore, we propose a policy in which we would classify carriers as dominant in their provision of international common carrier services on specific routes. We request comments on the issues and proposals addressed in this *Notice of Proposed Rulemaking* and encourage full participation of U.S. carriers, users, and foreign interests.

V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on these proposals.[38]

44. For further information on this item contact Kathleen J. Collins, Assistant Director, Office of International Communications, (202) 632-0935, or Susan O'Connell, Attorney, Common Carrier Bureau, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
Procedural Matters

Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Initial Regulatory Flexibility Act

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed modifications to the Commission's 1985 *International Competitive Carrier* decision that adopted a foreign-owned U.S. carrier policy. The proposed modifications replace the policy with a new policy that treats U.S. carriers, whether U.S.- or foreign-owned, that are not dominant under other provisions of the 1985 decisions as dominant in their provision of international common carrier services only for those routes where their affiliates have the ability to discriminate against non-affiliated U.S. carriers through control of bottleneck facilities and services in a foreign market.

Objectives

The Commission seeks to evaluate regulatory modifications that reflect the changed market circumstances for the provision of international common carrier services since the Commission adopted the original policy in 1985.

Legal Basis

The proposed action is authorized under section 1, 4, 7, 201-205, 211, 214, 218-220, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 303 and 403.

Reporting, Recordkeeping and Other Compliance Requirements

The actions contained in this *Notice of Proposed Rulemaking* may affect large and small carriers. These carriers may be required to comply with the proposed requirement to file certain reports, but this is not estimated to be a significant economic burden for these entities.

Federal Rules That Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposals discussed in this *Notice of Proposed Rulemaking* primarily will reduce regulatory requirements on affected carriers by streamlining regulation of foreign-owned U.S. carriers except on those routes where the U.S. carrier is affiliated with a provider of telecommunications facilities and services that has the ability to discriminate against nonaffiliated carriers through control of bottleneck facilities and services in the foreign market. This will respond to comments by affected carriers, most of which are small carriers, that they are subject to regulatory delays under the current policy that prevent them from effectively reacting to marketplace changes. Copies of this *Notice* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Notice* solicits comment on a variety of alternatives to achieve Commission objectives.

Paperwork Reduction

The proposals suggested include new reporting requirements that will allow us to assess whether to reduce regulatory treatment for affected U.S. carriers on certain routes. We recognize that implementation of any such requirements may be subject to review by the Office of Management and Budget (OMB). Copies of this *Notice* will be sent to OMB.

[38] This action is taken pursuant to Sections 1, 4, 7, 201-205,.211, 214, 218-220,222(b)(1), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 222(b)(1), 303(r), and 403.

Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before February 26, 1992, and reply comments on or before March 17, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

APPENDIX B

Proposed Rules

Part 63.01 Contents of applications.

(r) A certification that the applicant is not affiliated with a telecommunications provider in the countries to which it seeks to provide service, or a statement that the applicant is unable to make such a certification.

(1) The certification should state individually those countries in which the applicant does not have an affiliate.

(2) For purposes of this certification, an affiliate is any entity that controls, is controlled by, or is under common control with a provider of telecommunications services or facilities in a foreign market.

(3) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its principal shareholders or other equity holders and identify any interlocking directorates.

(4) Any applicant that cannot make the foregoing certification may provide information that demonstrates that its affiliate does not have the ability to discriminate against non-affiliated U.S. international carriers through control of bottleneck facilities and services in the foreign market as defined in the Report and Order in CC Docket No. 91-360 released _____.

Part 43.91 Reports of international carriers affiliated with telecommunications providers in foreign markets.

(a) Every carrier authorized under Section 214 to provide international common carrier services that is affiliated with providers of telecommunications facilities and services in foreign markets shall file a list of such affiliations with the Secretary.

(b) Any carrier authorized under Section 214 to provide international common carrier services that subsequently becomes affiliated with a telecommunications provider in a foreign market shall notify the Secretary within ninety (90) days of the transaction.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Regulation of International Common Carrier Services

I support this Notice of Proposed Rulemaking to examine our policy adopted in the 1985 International Competitive Carrier decision regarding regulation of "foreign-owned" U.S. international carriers. I look forward to reviewing the comments in this docket. I would hope that commenters will address the many issues raised in this item, and provide the Commission with a continuum of options within the proposed policy framework that it can assess and analyze. I also am interested in reviewing comments that address the resources the Commission should utilize in making the various assessments proposed in this item. I am particularly concerned that the Commission utilize all resources available within and outside the agency before making assessments of market power and discrimination. I would hope that U.S. agencies with relevant concerns in this area, such as the National Telecommunications and Information Administration [NTIA], the International Trade Administration [ITA], the office of U.S. Trade Representative [USTR], the Department of Treasury, and the Department of State, file comments in this docket. I also hope that the Commission would consider it relevant to obtain comment from telecommunications regulators in overseas markets where affiliation and market power assessments may be required.

This item raises interesting and complex issues. I look forward to discussing the merits of the proposed rules with the various interested parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibition on Common Ownership
of Cable Television Systems and
National Television Networks

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1991; Released: December 30, 1991

Comment date: March 2, 1992
Reply comment date: March 17, 1992

By the Commission: Commissioner Quello concurring and issuing a separate statement; Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. This *Second Further Notice of Proposed Rule Making* (*"Second FNPRM"*) invites further comment on our proposal to eliminate Section 76.501(a)(1) of our rules,[1] which prohibits common ownership of cable television systems and national television networks (the "network-cable cross-ownership rule").[2] In light of the significant changes in the video marketplace since the most recent comments in this docket were submitted in 1988, we believe it is useful to revisit this proceeding and update its record. These marketplace changes, which were closely examined in a recent Commission staff report,[3] include a continued decline in the broadcast networks' audiences and financial base and the emergence of the cable television industry as a more substantial competitive force in the production and distribution of video programming.

2. In our earlier notices in this proceeding, we invited comment on whether the network-cable cross-ownership rule may safely be eliminated and whether its repeal would promote increased efficiencies and benefits to the public. Through this *Second FNPRM*, we encourage interested parties to update the record on this issue. In addition, we recognize that parties commenting on our prior notices have raised serious questions regarding the impact of repeal on diversity and competition in the video marketplace. As a result, we believe that we should carefully consider these concerns to assess their legitimacy and to determine whether minimally intrusive regulatory safeguards are warranted to alleviate them if we decide to relax or repeal the rule. In this regard, we seek comment on certain alternative proposals aimed at addressing these concerns, and we also invite parties to propose any other safeguards or modifications that they consider appropriate.[4]

II. BACKGROUND

3. When adopting the network-cable cross-ownership ban in 1970,[5] the Commission expressed its concern that the television networks, if permitted to own cable systems at this critical stage of their development, could potentially thwart the cable industry's growth and inhibit competition. More generally, the Commission also stated that "the networks already have a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience."[6] Although the Commission did not elaborate further on the rule's rationale, its policy concerns were illuminated in its discussion of the broadcast-cable cross-ownership rule, which was simultaneously adopted and prohibits common ownership of local television stations and cable systems that serve the same area.[7] This discussion suggests that the principal concerns underlying the network-cable rule were that: (1) the networks could restrict the amount of competing programming supplied by their cable television systems due to their incentive to maximize the audience for their own network programming; (2) cable systems owned by a network could refuse to carry the programming of rival networks, thus hindering the development of new cable networks as well as limiting network competition nationwide; and (3) cable

---

[1] 47 C.F.R. Section 76.501(a)(1) was originally adopted as 47 C.F.R. Section 74.1131. This rule provides that "[n]o cable television system (including all parties under common control) shall carry the signal of any television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in... a national television network (such as ABC, CBS, or NBC)."

[2] *See Notice of Proposed Rule Making* (*"Notice"*), BC Docket No. 82-434, 91 FCC 2d 76 (1982). *See also Further Notice of Proposed Rule Making* (*"Further Notice"*), BC Docket No. 82-434, 3 FCC Rcd 5283 (1988).

[3] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, June 1991.

[4] We note that in response to our *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4951 (1991), seeking comment on changes in the state of the video marketplace and the policy implications that flow from these changes, several parties have already submitted comment on the merits of the networkcable cross-ownership rule. We will consider those comments in the context of this proceeding, but also invite those parties to comment on the specific proposals for modifying the rule described below.

[5] *Second Report and Order* in Docket 18397, 23 FCC 2d 816 (1970), *recon. denied*, 39 FCC 2d 377 (1973).

[6] 23 FCC 2d at 821.

[7] 47 C.F.R. § 76.501(a)(2).*See Second Report and Order*, 23 FCC 2d at 819; 39 FCC 2d at 391. The Cable Communications Policy Act of 1984 codified the Commission's broadcast-cable cross-ownership rule but not the networkcable cross-ownership rule. *See* Pub. L. No. 98-549, 98 Stat. 2779 (1984), Section 613(a). 47 U.S.C. § 533(a).

ownership could enhance the networks' dominance as suppliers of television programming, thus limiting the diversity of voices in the video marketplace.[8]

4. Beginning in 1980, several studies questioned the necessity of the network-cable cross-ownership rule and emphasized the increasingly competitive nature of the video marketplace. These studies included reports by the Commission's Network Inquiry Special Staff ("Special Staff"),[9] the Office of Plans and Policy ("OPP"),[10] and the majority staff of the House Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce.[11] We cited these studies in our first *Notice*, issued in 1982, that proposed to eliminate the cross-ownership rule in light of the growth of the video marketplace and the development of cable television services. The comments in response to the *Notice* were mixed, with the National Association of Broadcasters ("NAB"), the Department of Justice ("DOJ"), the three national television networks, and the National Cable Television Association ("NCTA") supporting our proposal to eliminate the rule, and the Small Business Administration ("SBA") and several public interest groups opposing it.

5. In 1988, we issued a *Further Notice* to solicit additional comments on our proposal to eliminate the rule. Given the time elapsed since the *Notice*, we allowed interested parties to comment on any intervening developments or circumstances that might affect our evaluation of the network-cable crossownership rule. In particular, we noted a report by the National Telecommunications and Information Administration ("NTIA"),[12] which concluded that broadcast television networks should not be prohibited from owning local cable systems. The *Further Notice* also observed that significant statutory or regulatory changes may have altered the nature of competition between the cable and broadcasting industries, including the adoption of the 1984 Cable Act,[13] the elimination of our "must carry" rules,[14] and the reimposition of our syndicated exclusivity rules.[15] Accordingly, we sought specific comment on whether the opportunity for networks to own cable systems in markets containing their affiliated stations might adversely influence negotiations for affiliation contracts. Considering the absence of must carry, we also asked whether a network that affiliates with a local station while owning a cable system in the same market could undermine the competitive position of other broadcast facilities in that market. A summary of the comments received in response to the *Further Notice* is contained in Appendix B.

III. REQUEST FOR FURTHER COMMENT

6. The changes in the video marketplace that we detailed in our prior Notices have continued to develop. The cable industry is now a robust, independent enterprise, with systems and networks offering an increasing diversity of programming that competes directly with over-the-air broadcast services. In the midst of this steadily rising competition, the television networks face a growing need to generate additional revenues in response to declining audiences and advertising sources.[16] As discussed below, these critical developments have prompted us to revisit the issue of whether eliminating our network-cable cross-ownership rule would enhance network efficiency and generate public benefits.[17]

7. We recognize, however, that a number of commenters responding to our prior Notices have expressed concerns that repealing the current restriction could undermine competition and diversity in local and national video markets. We thus seek to explore those concerns in this proceeding to assess their validity, to analyze whether they could be satisfactorily addressed by imposing minimally intrusive regulatory safeguards, and to determine the extent to which the record supports relaxing the rule.

Rule Elimination

8. We ask commenters first to address whether, in light of the significant changes in the video marketplace, the network-cable cross-ownership rule should be eliminated. In this regard, we note that the near complete dominance of the three broadcast networks, which existed when the rule was adopted and persisted for many years, has clearly diminished and left the networks with the need to adapt to a changing economic and competitive environment. According to the recent OPP Working Paper, the networks are experiencing a significant reduction in advertising revenue, their traditional base of economic support, that will force the networks either to reduce their costs and "downsize" their operations, or to develop supplementary revenue streams.[18]

9. One potential means of both reducing costs and increasing revenues would be for the networks to enter the cable television business. The networks would appear well-equipped to compete in the cable industry, given their experience and expertise in selling national advertising, acquiring and distributing programming, producing news programming, and working with a diverse group of local affiliates. Moreover, allowing the networks into cable would enable them to take advantage of the benefits that

---

[8] *See Notice*, 91 FCC 2d at 82.

[9] *See New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, October 1980.

[10] K. Gordon, J. Levy and R. Preece, *FCC Policy on Cable Ownership* (Staff Report, FCC Office of Plans and Policy), November 1981.

[11] *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, Committee Print 97-V, 97th Congress, 1st Session, November 3, 1981.

[12] "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," NTIA Report No. 88-233, June 1988 ("NTIA Report").

[13] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984).

[14] *See Quincy Cable TV Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[15] *See Report and Order* in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

[16] *See Report and Order*, MM Docket No. 90-162, 6 FCC Rcd 3108, 3134 (1991). *See also* OPP Working Paper No. 26.

[17] The potential benefits and anticompetitive consequences of vertical integration in the video marketplace are discussed more completely in the *Notice* and the studies referenced therein. *See* fn. 2, *supra*.

[18] *See* fn. 3, *supra*.

accrue from vertical integration into both cable system ownership and television programming services -- benefits that we recently detailed in our July 1990 Report to Congress on the status of competition in the cable industry.[19]

10. The increased revenues that may flow from network entry into cable system ownership also could benefit affiliate stations that depend on a network's programming and economic resources. In this fashion, any efficiencies resulting from network-cable cross ownership might improve the quality and diversity of programs available to the public from affiliate television stations. We further note that independent television stations could benefit from the diversity of network fare because of their reliance upon off-network syndicated programming. Nonetheless, we recognize that these stations have raised serious concerns in the past about the possibility of repealing or relaxing the rule.

11. In addition to providing new opportunities for the television networks, permitting network-cable integration could produce efficiencies that accrue to the benefit of cable subscribers. We note that we have recently taken a series of actions in which we emphasized the need to encourage greater competition to cable television systems.[20] Clearly, the television networks are some of the most likely potential entrants into cable delivery. Accordingly, in evaluating the continuing validity of the network-cable cross-ownership restriction, we believe we should rigorously analyze the competitive effects on both broadcast and cable services that may flow from eliminating this rule. In this regard, commenters are invited to address in particular any public interest or competition concerns that may be raised if a cable multiple system operator (MSO) were to acquire a broadcast television network.

12. We stress that any repeal of the network-cable cross ownership restriction would not be designed to provide an artificial boost to the networks' competitive position. Rather, in light of the fundamental support that the networks provide to the free, over-the-air broadcast system, we seek to remove undue barriers to their continued competitive vitality. In this regard, we observe that the decline of a number of significant industries has been exacerbated by regulations that failed to keep pace with marketplace changes. We thus emphasize the value of carefully scrutinizing government rules that prevent certain sectors of an industry from entering into related activities, particularly when the industry is as dynamic as the video communications marketplace.

Alternatives for Rule Modification and Safeguards

13. In undertaking a thorough reexamination of the network-cable crossownership rule in this proceeding, we recognize that some parties have raised valid questions concerning the impact that repeal of the rule may have on competition and diversity. We thus believe that it is appropriate to consider more fully the concerns raised by various commenters in response to the *Further Notice*. As discussed in Appendix B, the commenters that opposed eliminating the network-cable cross-ownership rule contended that: (1) networks could discriminate against nonaffiliates with respect to cable carriage; (2) networks would gain undue leverage over their affiliates in their contractual and program clearance negotiations; (3) networks would promote national rather than local programming and divert funds from news and public affairs programming; (4) networks might bypass their local affiliates and deliver their programming directly through their cable systems; (5) networks still dominate the video marketplace and could hamper the development of competitive cable networks; or (6) a major cable MSO could acquire a network and create an excessive concentration of media control. We seek comment on the merit and significance of these concerns in the current video marketplace. Parties may also wish to consider the extent to which other existing rules -- such as the local broadcast station-cable cross-ownership rule or our regulations limiting network control over network affiliates -- might ameliorate some of the enumerated concerns.[21] In addition, to the extent the updated record establishes that these or other concerns warrant relaxing, but not completely repealing, the rule, we seek comment on a variety of options, described below, that would permit cross-ownership of broadcast networks and cable systems subject to various constraints. Parties may consider the proposals individually or in certain combinations, and are also encouraged to present alternative suggestions.

14. *Network ownership of cable systems in "large" or "competitive" markets, including where second competitive cable systems exist.* This option, first, would allow networks to own cable systems in large markets under the theory that permitting network entry only in such markets might pose the least potential threat to diversity and competition. In exploring this option, we seek comment on the appropriate definition for "large" markets. For example, we could use market rankings such as the top 10, 25, or 50 markets. Second, with respect to the "competitive" market approach, we could permit network ownership of cable systems based upon the availability of a certain number of television broadcast signals in the community.[22] As another means of measuring the level of competition, we could also allow networks to operate cable systems where they would provide a second or "competing" cable service or, more broadly, at least a second or "competing" multichannel competitor. This provision would mitigate competitive concerns and offer procompetitive benefits because two or more multichannel competitors would seek to offer service to subscribers in the same community.[23] We also seek com-

---

[19] *See Report* in MM Docket No. 89-600, 5 FCC Rcd 5008-5010 (1990).

[20] *See e.g., Second Report and Order* in Gen. Docket No. 90-54, FCC 91-302, released October 25, 1991; *Order on Reconsideration* in Gen. Docket No. 90-54, FCC 91-301, released October 25, 1991; and *Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry*, in CC Docket No. 87-266, FCC 91-334, released November 22, 1991.

[21] *See* 47 C.F.R. § 76.501 (a)(2). *See also* 47 C. F. R § 73.658.

[22] *Compare Report and Order*, MM Docket No. 90-4, 6 FCC Rcd 4545 (1991). *Compare also Report and Order*, MM Docket No. 87-8, 6 FCC Rcd 4212 (1991).

[23] We also observe that the limited number of competing cable systems may cause this option to create only a few initial opportunities for network ownership.

ment on whether markets should satisfy both the "large" and the "competitive" conditions before we would permit network-cable cross-ownership.

15. We note that a network-owned cable system might encounter sufficient competition under these options to discourage any attempt to discriminate against local broadcasters. In addition, these options would afford an opportunity for us to monitor and evaluate the results of relaxing the rule. However, the options would restrict the networks' flexibility to enter those markets where they could realize the greatest efficiencies through cross-ownership of cable systems.

16. *Network ownership of cable systems up to a national subscriber limit.* This option would allow networks to acquire cable systems up to some national aggregate subscriber limit. Under this option, networks could take advantage of economies attainable through owning multiple cable systems, but not without some limit on their participation in the cable marketplace nationwide. We seek comment on the appropriate national subscriber limit we might use (*e.g.*, 10%, 15%, or 25% of all subscribers nationwide) if this option were adopted. We also note that we recently expressed our general opposition to limits on the horizontal growth of cable MSOs in our July 1990 Report to Congress on competition in cable television.[24] We thus seek comment on the merits of nonetheless applying such restrictions only with respect to broadcast network cross-ownership.

17. *Network ownership of cable systems subject to must carry and discrimination safeguards.* This option would allow networks to own cable systems subject to (1) mandatory carriage of all or most local stations, and (2) a prohibition of favoritism toward affiliates through carriage, channel position, and technical quality. Network ownership of cable systems subject to these safeguards arguably would meet the dual goals of capturing the benefits of network entry while directly addressing the discrimination concerns raised by local broadcast stations. In addition, the safeguards may not impose an undue burden upon networks, given that a network-owned cable system would have an incentive to provide local broadcasting services without discrimination in order to remain competitive. However, we are concerned about the prospects of tailoring new must carry rules to resolve objections raised in previous court decisions.[25] In this regard, we seek comment on a viable legal rationale for mandatory carriage of local broadcasters under such a rule. We also ask for comments on whether to (i) require network-owned cable systems to "freeze" the existing channel lineup, (ii) include on-channel protection for local signals, or (iii) adopt a non-bypass safeguard that prohibits a network from refusing to affiliate in any market where it owns a cable system and has previously affiliated with a local broadcast station.[26]

IV. CONCLUSION

18. In this *Second FNPRM*, we reexamine the network-cable cross-ownership rule and we seek further updated comments on the merits of eliminating the rule. We also offer a number of possible modifications to the existing rule in response to various concerns raised regarding possible anticompetitive practices by networks as owners of cable systems. In addition, we seek other comments or suggestions from interested parties with respect to the continued necessity of the network-cable cross-ownership rule.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

19. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

20. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 2, 1992,** and reply comments on or before **March 17, 1992.** To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

22. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

---

[24] *See* fn. 19, *supra*.
[25] *See* fn. 14, *supra*.
[26] The subject of mandatory signal carriage rules as applied on a more general basis is under review in our *Report and Order and Second Further Notice of Proposed Rule Making* in Docket 90-4, 6 FCC Rcd 4545 (1991).

For further information on this proceeding, contact James Coltharp, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. The proposals under consideration will modify or eliminate the existing prohibition on cross-ownership between cable television systems and national television networks. The Commission believes that, in its current form, this prohibition is no longer necessary in terms of its original purposes and that possible cost benefits attributable to cross-ownership are being needlessly forgone by continuation of the rule in its entirety.

II. Objectives. The objective of this action is to eliminate unnecessary regulation, thus permitting the marketplace to operate more freely and efficiently. In particular, networks may benefit by their ability to own cable systems, and cable systems may benefit through being owned by networks.

III. Legal basis. The proposed Rule Making action is authorized by Sections 1, 2, 3, 4(i) and (j), 303, 307, 308, 309 and 403 of the Communications Act of 1934, as amended.

IV. Reporting, recordkeeping and other compliance requirements. No recording, record keeping or reporting requirements for cable television operators are involved. Depending on the proposed action, however, it may eliminate the need for possible Commission compliance actions or waiver proceeding related to the existing rule.

V. Federal rules which overlap, duplicate or conflict with this rule. None.

VI. Description, potential impact and number of small entities affected. The proposals under consideration are not expected to have a significant impact on most small cable systems. However, to the extent that networks purchase existing small cable systems, the systems may benefit from the expertise of the network, or from the possible infusion of additional capital into the cable system. To the extent that networks choose to purchase large cable systems or that large cable systems choose to purchase networks, there should be little or no direct impact on small business entities.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objective. Several of the proposals under consideration minimize the impact on small entities.

APPENDIX B

SUMMARY OF COMMENTS TO THE FURTHER NOTICE

1. *Supporting Comments.* In response to the 1988 *Further Notice,* the networks, cable operators, and NTIA filed comments in support of eliminating the rule. These commenters emphasized the cable industry's strength in the current video marketplace as well as the benefits of vertical integration. Specifically, the three networks argued that their power has diminished since 1970, when the rule was adopted, and that they have no incentive to engage in anticompetitive behavior. They maintained that eliminating the rule would not restrict the amount or diversity of cable programming, nor would it hinder the development of new cable networks. They also asserted that permitting network ownership of cable systems would not distort network relations with local affiliates, and networks would not exclude local broadcast stations from their cable systems. According to the networks, such anticompetitive practices could cause financial losses and would encourage both competitive entry and federal intervention.

2. NCTA and other commenters claimed that the ban on network ownership of cable systems is no longer necessary because the rule already has served its purpose. They argued that the strength of the cable industry would prevent broadcast networks from hindering the further development of cable systems, and further asserted that such networks lack the financial resources to purchase enough cable systems to accumulate a market share that would raise competitive concerns. Proponents of network ownership also contended that the benefits of vertical integration -- in particular, the opportunity to avoid transaction costs in obtaining programming -- outweigh any anticompetitive risks. For instance, the investment of many cable operators in Turner Broadcasting and CSPAN has contributed to the expanding supply of cable programming. Furthermore, these commenters noted that there is no evidence in the cable industry to indicate that multiple system operators ("MSOs") favor their own programming to the exclusion of unaffiliated programming.

3. With respect to the two concerns raised in the *Further Notice* regarding the potential for anti-competitive practices, proponents of eliminating the rule argued that networks are unlikely to deny carriage to local broadcast signals because the public generally demands access to all local channels. Indeed, the local network affiliates are the most popular stations in every market. Consequently, networks engaging in a "bypassing" strategy would risk losing a large number of cable subscribers in exchange for a few additional broadcast viewers, rendering the strategy unprofitable. Similarly, these parties asserted that networks have no incentive to threaten to drop their own local affiliates in the course of affiliation negotiations. Indeed, networks rely on strong local viewership to attract national advertising, and the time and cost of cultivating affiliate relationships would make it economically unreasonable to drop a local affiliate.

4. NTIA and New York City supported our proposal to delete the networkcable cross-ownership rule, but asserted that certain safeguards are necessary to ensure that networks operating cable systems do not discriminate against competitors or reduce the level of competition or diversity in a particular market.[27] For example, NTIA proposed that the Commission establish a system for reviewing petitions challenging specific network proposals to acquire cable systems in smaller markets where (i) there is a high cable penetration rate, and (ii) the network-owned cable system would serve an area substantially equivalent to its affiliate's coverage area.[28] The Wireless Cable Association also supported removing the cross-ownership restriction, but not before the Commission adopts rules to ensure that vertical integration does not preclude the establishment of alternative video distribution methods to coaxial cable.

5. *Opposition Comments.* Opposing commenters included the Motion Picture Association of America, Inc. ("MPAA"), the three network affiliate associations ("Affiliates"), Association of Independent Television Stations, Inc. ("INTV"), Association of National Advertisers, Inc. ("ANA"), Turner Broadcasting System, Inc. ("Turner"), Group W, Fisher Broadcasting Inc. ("Fisher"), Arizona Television Company ("Arizona"), Brechner Management Company ("Brechner"), Holston Valley Broadcasting Corporation ("Holston"), and the U.S. Catholic Conference ("USCC"). These parties argued for retention of the rule based on concerns that, given the absence of must carry rules, network cable operators could refuse to carry certain broadcast and cable signals.

6. For example, the Affiliates stated that cable systems provide the final transmission path to viewer homes, and a network that controls this path currently has no government-imposed obligation to carry the signal of its local affiliate or any of its competitors. As a result, the Affiliates claimed, network-owned cable systems would have complete discretion to discriminate against local and distant stations that carry programming and advertising in competition with the networks. The Affiliates alleged that such discrimination would not only inhibit competition in the sale of local programming and advertising, but it would also restrict the diversity of programming and advertising services available to subscribers of network-owned cable systems.

7. According to Fisher, broadcast stations "live or die" based on reaching an affiliation agreement with one of the networks. If the rules were repealed, Fisher asserted, a broadcast station could not negotiate an affiliation agreement at arms-length with a network because of the persistent threat that the network's cable system could drop the station. Thus, Fisher claimed that an affiliate would have to accept any affiliation offer from a network, even at an unreasonably low payment, and attempt to survive by cutting back on budgets reserved for news and local programming.

---

[27] New York City recommended that we implement regulatory safeguards to ensure that network ownership of cable systems does not lead to unacceptable media concentration levels in a particular cable television viewing area, and stated that we should urge Congress to enact statutory must carry rules to prevent anticompetitive behavior by networks as cable operators.

[28] Under this proposal, petitioners would bear the burden of demonstrating that the proposed acquisition is not in the public interest.

8. The opponents of eliminating the rule also argued that networks could discriminate in the competition for advertising dollars, creating an inherent conflict of interest between a network and its own affiliates. According to Group W, network acquisition of cable systems would cause the networks to compete with their own affiliates for local advertising dollars, with the networks maintaining an unfair advantage due to their size and power. Although networks may argue that they have no intention of engaging in such discriminatory practices, Group W urged the Commission to act carefully and allow cross-ownership only upon a strong showing that no harm will occur.

9. Still other commenters asserted that allowing networks to own cable systems would signal the demise of free television programming currently available to virtually all American households. Arizona contended that networks owning cable systems would ultimately conclude that their interests are best served by gradually shifting their budget and best programming over to their cable systems. As a result, affiliate stations would have less funds available for local programming and news, causing many viewers that remain dependent upon free television to receive an inferior product. Arizona concluded that the Commission should retain the rule due to great potential for public harm. In an alternative scenario, MPAA warned that eliminating the rules would allow large cable MSOs to purchase a television network, although MPAA and other opponents to network ownership believed that the networks were still primarily dominant in the video market.

Concurring Statement of Commissioner James H. Quello.

In the Matter of: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

Generally, I am in favor of receiving comments on important matters affecting the broadcast and cable industries, so I can support issuing this Second Further Notice of Proposed Rulemaking. However, since this Notice comes so soon after the Commission received input in the Future of Television Inquiry, some have suggested that it represents at least a tentative conclusion to relax or repeal the network-cable cross-ownership rule. My vote should not be so interpreted. While I am willing to consider proposals to change the rule, my guiding principle will be the probable effect of such action on the maintenance of free over-the-air television.

To the extent some view this Notice as the preliminary announcement of an impending change in the rules, I would caution my fellow Commissioners to ensure that any new rules are consistent with the Commission's other policies, particularly those adopted recently. This concern also is most pressing when the Commission alters some of its rules as a result of changes in the video marketplace, but not others.

Such a lack of consistency was a major reason the Court of Appeals struck down "must-carry" rules in 1985. For example, the Court found the Commission's failure to question the assumptions underlying must-carry rules to be "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In particular, the Court noted that "the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules," both of which were premised on the same regulatory interest as must-carry — "protect[ing] broadcast television from competition from the expanding cable industry." *Id.* While marketplace changes and Commission actions over the past few years have enhanced the need to reimpose some type of must-carry rules,[1] the need for consistency in Commission policy remains constant.

For this reason, it is imperative that the Commission is mindful of its overall policies as it reviews the comments in this proceeding. For example, can the Commission reconcile a majority's recent conclusion that "the networks continue to benefit from historical structural advantages"[2] with the Notice's statement that "the near complete dominance of the three broadcast networks . . . has clearly diminished"? Notice at ¶ 8. Is it consistent for the Commission to retain significant financial interest and syndication restrictions while concluding in this Notice that marketplace changes "will force the networks either to reduce their costs . . . or develop supplementary revenue streams"? *Id.*

Similarly, can the Commission justify allowing greater vertical integration through network-cable combinations in light of its 1990 conclusions that "vertically integrated MSOs have the ability to limit competition to particular programming services" and that "most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve"?[3] The Commission recently reaffirmed the principle that the main competition to cable television is a complement of over-the-air broadcasting signals. *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545 (1991). Is it consistent for the Commission to permit the primary competitors in local video distribution markets to merge?

Finally, it is significant that the policy purposes underlying the network-cable restrictions are closely related to those for the more general broadcast-cable cross-ownership ban. *See* Notice at ¶ 3. Of course, the broadcast-cable restrictions have not been targeted for retirement, obviously because these rules were codified in the Cable Act. *See* Notice at ¶ 3 & n.7. But to relax or repeal one of the rules while the other remains in place might create a serious imbalance in the Commission's policies.

I ask these questions not because I have firm opinions on the probable answers but because I believe the Commission must address these issues in addition to those raised in the Notice. I also believe that presumption favors the continuation of rules that were enacted to promote diversity in

local video markets. This is unlike the situation in the financial interest and syndication proceeding where I have said that changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers. By sharp contrast, the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.

This brings us full-circle to the question of safeguards, which are discussed prominently in the Notice. Certain of the alternatives, such as limiting cross-ownership to large markets or imposing national subscriber limits, may not address the problem of local bottlenecks. Other options, such as must carry, recently have been criticized inside the Commission,[4] raising again the question of consistency.

I will review the comments filed in this proceeding carefully and will attempt to assess what effect any rule change will have on free over-the-air television. Ultimately, it is the Commission's responsibility in the public interest to answer that question, which this proceeding squarely presents.

---

[1]As this Notice recognizes, the relative fortunes of the broadcasting and cable industries have shifted radically over the past few years. Not only have there been marketplace changes, but the Commission has reimposed certain regulations such as syndicated exclusivity rules. *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 (1988), *aff'd United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). *See also Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545, 4564-66 (1991) (issuing *Second Further Notice of Proposed Rulemaking* on whether to reimpose carriage requirements as part of effective competition standard).

[2]*Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3109 (1991), *modified*, ___ FCC Rcd. ___ (1991), *appeal pending* No. 91-2350 (7th Cir.).

[3]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 127 (1990). Indeed, with respect to the anticompetitive practices described in the Cable Report, the Commission found that "the record in this proceeding indicates that some [cable systems] have [engaged in such tactics]."

[4]*See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. at 4575-76 (Separate Statement of Chairman Alfred C. Sikes).

SEPARATE STATEMENT
OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of Common Ownership of Cable Television Systems and National Television Networks (MM Docket No. 82-434)

As I have said before in other contexts, it is appropriate that the Commission periodically examine its rules to determine whether our oversight remains consistent with the public interest. Perhaps nowhere is this process of review more critical than in the rapidly changing world of broadcast and cable television.

I have noted several times since June 1990 that the prohibition on cross-ownership of cable systems and national television networks is, in my judgment, ripe for reexamination. The rule springs from an era when the balance of economic power in the video marketplace was decidedly different. Asking whether these restrictions continue to advance the best interests of the viewing public seems quite fitting when we consider the vastly changed industry.

Let me be clear, however, that to ask the question does not predetermine the answer. I enter this proceeding completely open to the arguments on all sides. I am interested in the possible improvements that might arise if the rule were relaxed or repealed. I am also concerned about the impact of any change on local affiliates and independent stations. I look forward to receiving comments on these issues and will pay particular heed to the discussion of safeguards that we might adopt if the rule indeed changes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 431
Telephone Companies

Revisions to Tariff F.C.C. No. 4

ORDER

Adopted: January 10, 1992; Released: January 10, 1992

By the Chief, Common Carrier Bureau:

1. On October 15, 1991, BellSouth Telephone Companies (BellSouth) filed Transmittal No. 431 to introduce Digital Transmission Service (DTS), which provides digital transport of analog and digital channels between a customer designated premises and its normal serving wire center. DTS consists of a digital system which transports up to 24 individual channels, each of which may be provided as either an analog or a digital interface, as selected by the customer. BellSouth will provide D-4 channel bank equipment (multiplexer equipment) at the customer's premises to convert the high capacity 1.544 Mbps facility into the multiple analog and digital channels ordered by the customer. Tr. 431 Description and Justification (D&J) 2-1 - 2-2.

2. On October 30, 1991, Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 431. IDCMA argues that DTS is designed in contravention of Commission rules and policies because it includes, as part of the transmission service, customer premises equipment (CPE). IDCMA Petition at 2. IDCMA asserts that the CPE included in the DTS offering can and should be provided on an unbundled and detariffed basis, and cites Section 64.702(e) of the Commission's Rules, 47 C.F.R. § 64.702(e), for the proposition that the bundling of CPE with regulated network services is forbidden. *Id.* at 2-4. IDCMA further contends that the limited "multiplexer exception" established in the Second Computer Inquiry proceeding and relied upon by BellSouth does not apply to a service structured in the manner of DTS. *Id.* at 8-12. Finally, IDCMA asserts that BellSouth has not complied with the requirements for advance disclosure of technical information about new or changed network services, because an insufficient amount of advance notice was given. *Id.* at 15-18.

3. BellSouth replied on November 12, 1991. BellSouth argues that the Commission has specifically included D-4 channel bank equipment within the multiplexer exception, and that the multiplexer equipment as used in DTS does not perform prohibited functions. BellSouth Reply at 2-3. BellSouth contends that, without the ability to include multiplexers as network equipment as proposed in DTS," carriers would be totally precluded from using 'new technologies' (*i.e.*, digital transmission facilities) to more efficiently deliver analog network services to customers." While BellSouth admits that the use of D-4 channel banks is not "totally transparent to the customer," it asserts that such use "still meets the policy objectives of the multiplexer exception" because it "permits carriers to improve the efficient utilization of their loop plant." *Id.* at 4-5. Finally, BellSouth states that it has not violated the Commission's network information disclosure rules. *Id.* at 9-10.

4. Section 64.702(e) of the Commission's Rules states that," except as otherwise ordered by the Commission," CPE provided in conjunction with the network must be "separate and distinct from provision of common carrier communications services and not offered on a tariffed basis." 47 C.F.R. § 64.702(e). This rule was established in the Commission *Second Computer Inquiry*.[1] In a subsequent Order, the Commission explained that its requirement for unbundling of CPE placed a "high threshold burden on a carrier to demonstrate that a particular type of equipment located on the customer's premises should be considered part of a common carrier offering."[2]

5. The Commission most recently addressed the multiplexer exception in *Phase II Reconsideration Order*,[3] which permits equipment currently provided under the exception to remain as part of the network under certain conditions, and imposes a waiver requirement and a new standard for future provision of multiplexer equipment under tariff. That Order states that "we retain the regulated status of equipment, such as the SLCs [subscriber loop carriers] and the DS-4 (sic) channel banks cited by Bell Atlantic, that carriers have been providing on customer premises, with our acquiescence, under the multiplexer exception." *Id.* at 1167. The referenced Bell Atlantic pleading, Bell Atlantic Reply to Oppositions, filed August 19, 1987, in the Computer III, Phase II Reconsideration proceeding, states: "The Commission explicitly permitted exchange carriers to deploy subscriber loop carrier ("SLC-96") systems on customer premises to make efficient use of loop plant.... Deployment of subscriber loop carrier systems and similar D-4 channel bank multiplexers has saved Bell Atlantic tens of millions of dollars in additional loop plant that would otherwise have been required." The use of D-4 channel banks included in BellSouth Transmittal 431 is not the use referenced by Bell Atlantic and cited with approval by the Commission. Bell Atlantic referenced the use of multiplexing equipment to enable the provision of service. BellSouth Transmittal 431 includes multiplexing as a part of the service.

---

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC2d 384 (1980), *on recon.*, 84 FCC2d 50 (1980) (*Second Computer Inquiry*).

[2] Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, 94 FCC2d 15 (1983).

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*).

Thus, BellSouth has failed to demonstrate conformance with equipment provisioning permitted under the multiplexer exception.[4]

6. Accordingly, IT IS ORDERED that, for the reasons stated above, the tariff revisions filed by BellSouth Telephone Companies in Tariff F.C.C. No. 4, Transmittal No. 431 ARE REJECTED.

7. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL FILE a supplement reflecting this rejection no later than five business days from the release of this Order. Special Permission No. 92-27 is assigned for this purpose.

8. IT IS FURTHER ORDERED that the petition to reject or, in the alternative to suspend and investigate BellSouth Telephone Companies' Transmittal No. 431 filed by Independent Data Communications Manufacturers Association, Inc. IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[4] Further, BellSouth has not requested a waiver of Section 64.702 as stated in the *Phase II Reconsideration Order*, which would demonstrate: (1) that permitting multiplexer functionality as part of regulated network service increases efficiency or enables a service not otherwise technically possible; and (2) that comparable efficiencies cannot be met if the multiplexing functionality is provided through CPE.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies — Transmittal Nos. 50 and 64

Tariff F.C.C. No. 1

ORDER

Adopted: January 10, 1992; Released: January 10, 1992

By the Chief, Common Carrier Bureau:

1. By Transmittal Nos. 50 and 64, the NYNEX Telephone Companies (NYNEX) establish unified recurring and nonrecurring interstate access rates of New England Telephone Company (NET) and New York Telephone Company (NYT). Tr. 50 Description and Justification (D&J) at 1.1. NYNEX asserts that as a result of this filing, which affects some 300 rate elements, unified rates will account for approximately 84 percent of its total interstate access revenues. NYNEX estimates that, as a result of rate unification, those revenues will be reduced by approximately $116,000. *Id.* at 2, 18.

2. In Transmittal 50, NYNEX stated that while total revenues will decrease slightly, customers who operated predominantly in the NET service area would experience an overall rate increase. NYNEX subsequently filed Transmittal 64 to implement the unification through a two-step transition plan designed to help alleviate the rate impact on its NET customers. Tr. 64 D&J at Section 2. In step one, NYNEX will increase NET's access rates by approximately 5 percent effective January 13, 1992. In step two, NYNEX will phase in the remaining increase with its July 1992 annual price cap filing, in which, NYNEX contends, some of NET's rate increases could be offset by rate reductions anticipated in the 1992 filing. *Id.*

3. On October 30, 1991, petitions to reject or suspend and investigate Transmittal 50 were filed by RCI Long Distance New England, Inc., d/b/a Long Distance North (LDN), and jointly by First Phone of New England, Inc., and Providence TMS Ltd., (First Phone/TMS). These petitioners challenge NYNEX's ratemaking method, arguing that NYNEX justified its unified rates by computing "imaginary" or "theoretical" Price Cap Indexes (PCIs), Actual Price Indexes (APIs), and Service Band Indexes (SBIs), which were based on hypothetical unified rates and derived from historical data. *See* First Phone/TMC Petition at 9; LDN Petition at 4-5. Both petitioners assert that the filing should be treated as an above-cap rate change, and should be suspended pending investigation. First Phone/TMS Petition at ii; LDN Petition at 7.

4. Both petitioners also complain of "rate shock." LDN asserts that unification will result in sharply increased APIs and SBIs for all of NET's services, while NYT customers will enjoy sharp price reductions. As a result, LDN states, rates for New England customers will increase 17 percent, a level far above New England's current price cap. LDN Petition at 7. First Phone estimates that its total switched access bill in New England will increase by 20 percent; TMS believes that its access costs will increase by between 11.4 percent and 16.4 percent. First Phone/TMS Petition at 3-7. LDN also argues that rate unification will have a severe anticompetitive effect on New England access customers, whose ability to provide alternative inter-LATA and interexchange services in New England will be significantly impaired. LDN Petition at 10.

5. On December 12, 1991, LDN filed a petition against NYNEX Transmittal 64, which presents NYNEX's two-step transition plan described above. LDN argues that Transmittals 50 and 64 continue to violate price cap guidelines despite the transitional plan because the new APIs and SBIs for NET customers are still above-band and above-cap. LDN Petition (Tr. 64) at 5-6. Thus, LDN argues, the plan does little more than delay the overall rate increase. *Id.* at 6-8. Moreover, LDN argues, NYNEX's transitional plan does not address any of the anticompetitive effects of rate unification identified by LDN in its petition against Transmittal 50. *Id.* at 9.

6. In opposition, NYNEX states that its unified rates comply with the price cap rules because they are revenue neutral within each price cap service basket. Further, NYNEX asserts, when all rate changes within its unified service categories are considered, the rates fall squarely within the Commission's 5 percent limit on price changes. NYNEX Opposition (Tr. 64) at 1, 9. NYNEX states that Section 69.3(e) of the Commission's Rules specifically allows carriers to unify or regionalize rates, and that most other Regional Bell Operating Companies have done so. NYNEX also argues that, in presenting unified PCIs, APIs, and SBIs, it is merely following established practice of those price cap carriers that use unified rates. NYNEX Opposition (Tr. 50) at 7-9.

7. The Common Carrier Bureau has reviewed NYNEX Transmittal Nos. 50 and 64 and the associated pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions to reject, or alternatively, suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal Nos. 50 and 64, filed by First Phone of New England, Inc., and Providence TMC Ltd., and by RCI Long Distance New England, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-218

In re Application of	
ISIS BROADCAST GROUP	File No. BPH-880301MG
JOELMART, INC.	File No. BPH-880301MJ
GRAZIANO BROADCASTING COMPANY	File No. BPH-880301NA
PATRICIA WHEELER WODLINGER	File No. BPH-880301ND
CHANEL BROADCASTING	File No. BPH-880301NH
P & T COMMUNICATIONS	File No. BPH-880301NO
SANTA BARBARA COMMUNICATIONS, INC.	File No. BPH-880301NR
DEBORAH LYNN SCZUDLO	File No. BPH-880301OA
YING HUA BENNS	File No. BPH-880301OE
DELTA BROADCASTING, INC.	File No. BPH-880301OL
For Construction Permit for a New FM Station on 299B1 in Santa Barbara, California	

Appearances

Lewis J. Paper and *Peter L. Scher* on behalf of Isis Broadcast Group; *Dennis P. Corbett* and *Maureen A. O' Connell* on behalf of Joelmart, Inc.; *Timothy J. Fitzgibbon* on behalf of Graziano Broadcasting Company; *James A. Koerner* on behalf of Patricia Wheeler Wodlinger; *Stephen Diaz Gavin* and *J. Jeffrey Craven* on behalf of Chanel Broadcasting; *Harry C. Martin* and *Troy F. Tanner* on behalf of P & T Communications; *David M. Silverman* and *Yvonne Rena Bennett* on behalf of Santa Barbara Communications, Inc.; *William H. Crispin* and *Jacqueline R. Kinney* on behalf of *Deborah Lynn Sczudlo; Linda K. Eckard, Howard M. Weiss* and *Christopher A. Holt* on behalf of Ying Hua Benns; *Peter A. Casciato* on behalf of Delta Broadcasting, Inc.; and *Gary Schonman* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 10, 1992; Released: January 23, 1992

1. Of the 26 applicants designated for a comparative hearing, ten remain to be considered in this decision. The applications were designated on April 11, 1990. *Hearing Designation Order*, 5 FCC Rcd. 3165 (M. Med. Bur. 1990). The following issues remain to be decided:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by P & T would constitute a hazard to air navigation.
>
> 2. (a) To determine whether Chanel is financially qualified to construct and operate its proposed facility for three months without revenues.
>
> (b) To determine whether Chanel falsely certified its financial qualifications to the Commission.
>
> (c) To determine whether the evidence on the foregoing issues requires that Chanel by disqualified.
>
> 3. (a) To determine whether Sczudlo falsely certified her financial qualifications.
>
> (b) To determine whether Sczudlo is financially qualified.
>
> (c) To determine whether the evidence on the foregoing issues requires that Sczudlo should be disqualified.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest
>
> 5. To determine, in light of the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on August 6, 1990. Tr. 1-14.[1] Hearing sessions to examine witnesses about their written testimony were held on February 5, 1991 (Tr. 18-242/249), February 6, 1991 (Tr. 250-500), February 7, 1991 (Tr. 510-793/799), February 8, 1991 (Tr. 800-1083/1099), February 11, 1991 (Tr. 1100-1331/1399); February 12, 1991 (Tr. 1400-1585), and July 9, 1991 (Tr. 1586-1769). The record was closed on the comparative issue on February 12, 1991 and on the qualifying issues on July 9, 1991. *Order*, FCC 91M-587, released February 14, 1991; *Order*, FCC 91M-2167, released June 12, 1991. Proposed findings and conclusions were filed on April 5, 1991. Replies on April 19, 1991, supplementary proposed findings and conclusions on August 22, 1991, and replies to supplementary proposed findings and conclusions on September 5, 1991.

FINDINGS OF FACT

Issue 1: Whether P & T's tower height and location would constitute a hazard to air navigation.

3. Within 30 days after release of the HDO, P & T amended its application to specify a site approved by the FAA. The amendment was accepted. *Memorandum Opin-*

ion and Order, FCC 90M-2422, released August 8, 1990. P & T did not move for summary decision and it did not introduce any evidence at the hearing on the issue.

Issue 2: Whether Chanel is financially qualified and whether it falsely certified.

4. Chanel certified that it was financially qualified in an amendment to its application filed June 6, 1988, signed by Cynthia Carter. Tr. 819, 875-76. Ms. Carter and Laura Simpson had determined that Chanel would need $400,000 to construct and operate the station for three months without revenue. Joelmart Exh. 15 at 10. A written budget was not prepared. Joelmart Exh. 16 at 35. For its certification, Chanel relied on a letter from the Texas Commerce Bank in Arlington (TCB) dated April 12, 1988, and signed by D. Keith Forrester, Vice President, Professional Banking Division, and David A. Jackson, Executive Vice President, Commercial Group. Chanel Exh. 12 at 2-3; Tr. 819-20, 877-78.

5. In mid-March 1988, Ms. Carter called her brother, Dr. Richard Carter, for assistance in obtaining a financial commitment. Tr. 878-80 883, 1635. Dr. Carter told his sister that he would help her by contacting TCB, where he was a customer. Tr. 880-81, 885, 1601, 1635-36, 1673. Dr. Carter then called Mr. Forrester, his account officer at TCB, and told him about his sister's application for a radio station, and of her need for a letter concerning financial backing for Chanel. Tr. 1636, 1660. Dr. Carter asked TCB to provide Chanel with such a letter because of his relationship with the bank. Tr. 1660. Ms. Carter received a letter from the bank addressed to Chanel dated March 31, 1988, which she sent to Chanel's counsel. Joelmart Exh. 17; Tr. 888-89.

6. Chanel's counsel concluded that the March 1988 letter did not meet the FCC's reasonable assurance requirements. Tr. 896-97. Thereafter, counsel contacted Mr. Forrester, and the letter of April 12, 1988, was issued. Chanel Exh. 12 at 2-3; Tr. 877-78; 898-900. The April 12 letter states that TCB is willing to extend a line of credit to Chanel up to $400,000, provided that the conditions and qualifications in the letter are met, including that Chanel (Chanel Exh. 12, at 2):

> (a) receive the construction permit; (b) request and receive approval of a formal lending commitment from the Loan and Discount Committee of the Bank, and (c) execute all customary documentation normally required by the Bank.

The "anticipate[d]" interest rate for the loan was to be calculated "at Texas Commerce Bank-Arlington base rate plus additional points as determined from month to month." *Id.* The letter went on to say that "[i]f the loan were to be collateralized with the assets of the permittee for the Santa Barbara FM station, our loan documents would comply with all requirements of the Federal Communications Commission . . . ." *Id.*, at 3. From the Bank's perspective, the only difference between the April and March letters was not substantive. Joelmart Exh. 17; Chanel Exh. 12 at 2-3; Tr. 1665-66. In addition both Mr. Forrester and Mr. Jackson signed the April letter, but only Mr. Forrester signed the March letter. Chanel Exh. 12, at 3; Joelmart Exh. 17, at 2.

7. Mr. Forrester signed the letters to Chanel with the express understanding that they were provided as an "accommodation" to Dr. Carter, and nothing more. Tr. 1667-8. Dr. Carter told Mr. Forrester that the Chanel principals would, at a later date, find a financial institution closer in proximity to them to be their bank. Tr. 1660. Dr. Carter also indicated to Mr. Forrester that it was "very unlikely" that TCB would actually be involved in any transaction. Tr. 1660-61. Mr. Forrester specifically recalls telling Mr. Jackson that the loan to Chanel would never be funded. Tr. 1669, 1671.

8. Mr. Forrester indicated that it was unusual for the bank to issue a letter like the one issued to Chanel (Tr. 1661), where the borrowers were unknown to TCB and located in Reno, Nevada, halfway across the United States. Tr. 1669-70. TCB, Arlington, has not made loans in the past to broadcast companies, nor to start-up companies in California. Tr. 1613. TCB had no intention of ever having to fund a loan to Chanel, or even of looking at the deal. Tr. 1670.

9. Before signing the letter, Mr. Forrester reviewed only a draft financing letter. Tr. 1656, 1662-63. Mr. Jackson did not review any documents regarding Chanel before signing the April 1988 letter. Tr. 1615-16. Mr. Forrester was the basis for Mr. Jackson's knowledge of the understanding between TCB and Dr. Carter. Tr. 1605. Dr. Carter and Mr. Forrester did not specifically discuss the terms of the loan; nor does either remember discussing the terms of the loan; nor does either remember discussing whether Dr. Carter would co-sign or guarantee a loan to Chanel. Tr. 1637, 1662. The bank had not determined how many points would be added to TCB's base rate in calculating interest on Chanel's loan. Tr. 1626-27. Mr. Forrester did not discuss with anyone what collateral for the loan would be; this was something to be addressed in the future. Tr. 1627, 1667. TCB had not even decided who the borrower would be. Tr. 1627. Dr. Carter had only one telephone conversation with Mr. Forrester prior to issuance of the April 12, 1988 letter, and never met with Mr. Forrester face to face concerning this letter. Tr. 1648, 1661-62. Mr. Jackson did not talk to Dr. Carter about either of the 1988 letters. Tr. 1615.

10. At no time prior to issuance of the March or April letters did TCB ask for additional information from Ms. Carter. Tr. 886. Ms. Carter has not provided TCB with any financial information. Tr. 903. Nor did Ms. Carter provide her brother with any financial information, such as a proposed budget, future business plans, or financial statements of Chanel for either of the Chanel principals. Tr. 886, 1651-52. Mr. Forrester did not know anything about either Ms. Carter or Ms. Simpson's personal credit history or employment background. Joelmart Exh. 15, at 44; Tr. 892-93, 1668-69. Ms. Carter has never banked at TCB; has never previously borrowed money from TCB; nor has she ever been to the bank to discuss the financing of the Chanel station in person. Tr. 888, 893, 902-03. Ms. Simpson never supplied any documents to Mr. Forrester or Mr. Jackson, nor corresponded, spoke or met with either of them. Joelmart Exh. 16, at 24-25; Tr. 821-22. In fact, Ms. Simpson has not even prepared a personal financial statement. Tr. 823. Neither Mr. Jackson nor Mr. Forrester knows whether Chanel is a partnership or corporation. Tr. 1614, 1668. Mr. Jackson did not even know who the owners of Chanel are. Tr. 1614. Mr. Forrester did not know Ms. Carter's ownership percentage in

Chanel. Tr. 1668. Mr. Jackson testified that it is relevant to the bank what Ms. Carter and Dr. Carter do with the money, even if it is secured by other assets. Tr. 1614.

11. From Mr. Jackson's perspective, the bank still had a long way to go before deciding to loan Chanel any money. Tr. 1625. Documents that TCB would need to review in considering a loan request from Chanel include: financial statements for the borrower and the principals; tax returns of the principals; biographical information about the principals; any partnership agreement; and income and expense projections. Tr. 1625-26; 1663-64. None of these documents had been reviewed in connection with Chanel in April of 1988 (Tr. 1626, 1664), and thus, TCB had no information on which to predicate a judgment about Chanel's ability to service the debt on any loan to Chanel. Tr. 1626.

12. Neither the March 31 nor April 12, 1988 letters contained any reference to a guarantee by any individual. Joelmart Exh. 15 at 24-25; Joelmart Exh. 17; Chanel Exh. 12 at 2-3. A third letter issued by TCB on February 19, 1991, mentions for the first time that the bank's willingness to extend a line of credit to Chanel rests on the guarantee of Dr. Carter. Chanel Exh. 12, at 4. The February 1991 letter was signed by Mr. Jackson, who is still employed at TCB; Mr. Forrester left TCB in October 1988 to go into business with his brother. The draft of the February 1991 letter provided to Mr. Jackson by Chanel was modified by him, most pertinently by changing the reference to a guarantee of Dr. Carter from "continues to rest" to "rests." Joelmart Exh. 19; Tr. 1622. This sentence was changed because the earlier letters did not specifically reference Dr. Carter. Tr. 1624.

13. Prior to the 1990 Christmas holidays, Ms. Carter claims to have never discussed the idea of a guarantee with Dr. Carter. Joelmart Exh. 15, at 26-28. Ms. Carter testified that she first learned that Dr. Carter had agreed to personally guarantee the loan in a telephone conversation with him during the 1990 Christmas holidays. *Id.*, at 28-29. Shortly after this discussion with her brother, Ms. Carter said that she told Ms. Simpson for the first time about Dr. Carter's willingness to guarantee a Chanel loan from TCB. Joelmart Exh. 15, at 40-41. There is no doubt in Ms. Carter's mind that she had never discussed with Dr. Carter or Ms. Simpson the issue of Dr. Carter personally guaranteeing a loan to Chanel from TCB prior to the 1990 Christmas holidays. *Id.*, at 28-29.

14. Ms. Simpson assumed that Dr. Carter was guaranteeing the loan, but she did not have any discussions with Ms. Carter specifically confirming her assumption before the April 12, 1988 letter was issued. Joelmart Exh. 16, at 11, 15-16. Ms. Simpson at first did not think that Ms. Carter had told her specifically about Dr. Carter's guarantee, but then, after an off the record discussion with counsel at her deposition, recalled that Ms. Carter had told her about Dr. Carter's guarantee on October 28, 1990, and there is "no doubt in [her] mind" that she has known about the personal guarantee since October 1990. Joelmart Exh. 16, at 49-51. For his part, Dr. Carter is "certain" that he did not discuss the subject of a personal guarantee with Ms. Carter during the 1990 Christmas holidays. Tr. 1650. In fact, Dr. Carter does not recall ever having told his sister that he was willing to personally guarantee a loan to Chanel from TCB. Tr. 1649-50.

Issue 3: Whether Sczudlo is financially qualified and whether she falsely certified.

15. Sczudlo certified that she was financially qualified in her application as filed on March 1, 1988. Tr. 1176-77. The basis for Sczudlo's certification is a letter from the Bank of Montecito (Bank) dated February 28, 1988, and signed by Phil Morreale, Assistant Vice President. Sczudlo Exh. 8, at Exh. B; Tr. 1178-79.

16. In February 1988, Sczudlo contacted Mr. Morreale at the Bank about a financing letter for her application. Tr. 1179. She did not have a relationship with the bank as a borrower or as a customer. Tr. 1179-80. Sczudlo was referred to the Bank of Montecito by County Savings Bank, where Sczudlo had a corporate account. Tr. 1180. Sczudlo had previously approached County Savings Bank about a financing letter, but they had indicated that this was not the type of venture they become involved in. Tr. 1181. After an initial telephone inquiry, Sczudlo met with Mr. Morreale, and provided him with a copy of her financial statement and a draft financing letter. Tr. 1193-95, 1208, 1723. The bank did a credit check on Sczudlo. Tr. 1194. Sczudlo stated that she told Mr. Morreale how much she would need. Tr. 1208. She did not provide Mr. Morreale with a written budget; she did not have a written budget as of February 25, 1988. Tr. 1190, 1208.

17. Shortly after a second meeting with Mr. Morreale, the Bank issued the February 29, 1988 letter to Sczudlo. Sczudlo Exh. 8, at Exh. B; Tr. 1210. This letter provides, in pertinent part, as follows:

> The Bank of Montecito is willing to lend you up to $300,000.00 to finance the construction and operation of your proposed radio station provided the following conditions are met.
>
> 1. All reasonable and ordinary credit criteria of this Bank are met at such time as you request a formal lending commitment and approval of such commitment is granted by Bank....
>
> The pricing, amortization covenants, conditions, collateral, and default provisions of any loan commitment will, of course, be contingent upon the conditions prevailing at the time of such commitment. Interest on any loan would be calculated at a spread above the rate of interest published from time to time as our Reference Rate as published in the Wall Street Journal, during the revolving portion and at a spread above such Reference Rate during the term loan portion. Any loan facility granted in connection with this project would carry a revolving period and term loan period.

While the draft letter Sczudlo provided to the Bank included interest rate, term, and specific collateral (Joelmart Exhibit 21; Tr. 1214-16) the letter issued by the bank did not include these items. Sczudlo Exhibit 8, at Exhibit B; Tr. 1214-16, 1686.[2] In addition, the draft language, "the Bank. . . is familiar with your financial capabilities" was replaced with "We are familiar with your plans to apply for a permit. . . ." Sczudlo Exh. 8, at Exhibit B; Joelmart Exh. 21; Tr. 1725-26. Mr. Morreale made this change because he did not have sufficient information about Sczudlo's financial capabilities. Tr. 1726. Finally, the Bank did not include in its February 28, 1991 letter the following sentence suggested in the draft letter: "Although this letter is not a legally binding commitment, we hereby state our present intention to make a loan to you, subject

to the following conditions. . . ." *Id.* This sentence was not included in the February 28 letter because the bank did not have all the necessary information on which to base a present intention to make a loan to Sczudlo. Tr. 1726.

18. At her October 1990 deposition in this proceeding, Sczudlo testified that the February 29, 1988 letter includes within its four corners the terms and conditions under which the bank will make funds available. Tr. 1213-14. However, at the February 11, 1991 hearing, after the financial issues against Sczudlo were designated, Sczudlo testified that terms such as interest rate, term and specific collateral, while not included in the letter, were discussed "in depth" with the bank. Tr. 1214. According to Sczudlo, Mr. Morreale indicated that the interest rate for a loan would be two to three percent over the Bank of America prime rate, the term would be three to five years, and $300,000 in certificates of deposit would be pledged as collateral. Tr. 1218-20. Sczudlo claims to have asked the bank why the specific terms they discussed were not in the letter, and the bank indicated that these terms were not included because it could take three to five years before a license is awarded, and a formal application for a loan filed. Tr. 1214, 1217-18, 1686. Sczudlo further claims that she did not pursue this matter any further with the bank because she did not think it was necessary to specifically outline the terms of the loan in her letter. Tr. 1215-16, 1686. Sczudlo thought that the bank letter would never be shown to the Commission. Tr. 1216.

19. According to Mr. Morreale, the conversations he had with Sczudlo about the loan merely concerned the general lending philosophy of the bank, which is provided to all prospective or existing customers who come into the bank. Tr. 1740, 1743, 1754-55. Mr. Morreale deliberately did not include any specifics in the Sczudlo bank letter because the bank did not have Sczudlo's financial and business plan or other relevant information. Tr. 1727. Not even a preliminary decision had been made as to what kind of collateral to require of Sczudlo because of the lack of information about the business. Tr. 1729. Documents that the bank would typically review in considering a loan request include: a personal financial statement; personal tax returns; a business plan; an assessment of the competition in the market; financial projections; and repayment ability. Tr. 1732-33. Mr. Morreale had not reviewed Sczudlo's tax returns, financial projections, business plan, or a written budget. Tr. 1733-34. The letter the bank provided was based on a review of her balance sheet and credit report which revealed nothing derogatory, and thus the bank was at least willing to consider a loan request in the future. Tr. 1735-36. The letter was not meant to say anything more. Tr. 1736. The Bank was providing Sczudlo with no assurance whatsoever that it would finance her business. Tr. 1731. In Mr. Morreale's opinion, Sczudlo had no reason to expect that the bank would lend her money after she obtained that letter. Tr. 1742-43.

20. Sczudlo contacted Mr. Morreale, in January 1991, to obtain from him a letter in connection with her opposition to the motion to enlarge issues filed against her. Tr. 1224, 1736. Sczudlo explained to Mr. Morreale that the original letter had not outlined the terms and interest, and asked whether he would put information regarding the specific terms of the loan in a letter. Tr. 1225, 1691. Sczudlo then sent Mr. Morreale a facsimile message on January 15, 1991, suggesting the precise terms that should be included in such a letter. Joelmart Exh. 22; Tr. 1690-91, 1737.

21. Mr. Morreale responded to Sczudlo's facsimile message with a letter, dated January 15, 1991, which indicated the bank was willing to review a loan request, and setting forth the information that would be needed in order to do so. Joelmart Exh. 23; Tr. 1692. The terms contained in this letter were no more specific than the terms in the February 29, 1988 letter. Joelmart Exh. 23. Mr. Morreale wrote the January 15 letter under the assumption that Sczudlo would be bringing the bank a formal loan request. Tr. 1738.

22. Sczudlo contacted Mr. Morreale after receiving the January 15 letter. She was concerned that there was a misunderstanding between the two parties. She explained that she was not seeking a formal loan commitment but was only looking back in time to the original letter. Tr. 1692-93, 1738. Sczudlo sent Mr. Morreale a letter dated January 16, 1991, outlining the information she was seeking, in particular interest rate, repayment term and collateral. Joelmart Exh. 24; Tr. 1695-96. On January 17, 1991, she sent Mr. Morreale a model letter by facsimile. Joelmart Exh. 25; Tr. 1697-98, 1740. Sczudlo then received a letter from Mr. Morreale dated January 17, 1991. The last two sentences of this January 17 letter read as follows:

> We are vaguely familiar with your interest in obtaining an FCC License and would be receptive to reviewing a request from you. In my letter dated January 15, 1991, I've identified items that would be required for us to initiate our review process.

Joelmart Exh. 26. Mr. Morreale then wrote a second January 17, 1991 letter at Sczudlo's request, replacing these two sentences with "Best of luck in your endeavors." Delta Exh. 5; Joelmart Exh. 26.

23. The second January 17, 1991 letter was attached by Sczudlo to her opposition to the motion to enlarge issues, without any mention of the previous bank correspondence from January 1991. The second letter, however, does not include any specific recollections of the 1988 "in-depth" discussions between Mr. Morreale and Ms. Sczudlo regarding the terms of the proposed loan. Joelmart Exh. 25, at 2; Delta Exh. 5; Tr. 1701-02. The second January 17 letter merely states that, during February 1988, a repayment term of three years and an interest rate floating at two to three percent above the Bank's Reference Rate would have been within the bank's general lending guidelines. Delta Exh. 5. This letter does not refer to collateral at all. *Id.*; Tr. 1225.

24. At the July 1991 hearing, Sczudlo testified that she was concerned about a "large misunderstanding" with the bank, and is "completely in a quandry about this." Tr. 1698-99. Despite a number of discussions and a meeting with Mr. Morreale about this matter, she had been able to reach no mutual understanding, but only, as Ms. Sczudlo described it, "loggerheads." Tr. 1697-99. However, Ms. Sczudlo also testified that she was not "really concerned" because she "didn't really understand the issue," and because of her financial situation, she felt she could fund construction of the station through her own assets. Tr. 1702, 1707. Ms. Sczudlo has not, to date, amended her application to substitute a new proposal. Tr. 1702-03.

Issue 4: Which proposal will best serve the public interest

Isis Broadcast Group

25. Isis is a California corporation with voting and nonvoting stock. Shirley G. Kennedy is president, a director and owns 12.7 percent of the stock, which is voting stock. Isis Exh. 1, at 1. Sylvia Y. Curtis is a director, secretary/treasurer, and owns 12.2 percent of the stock, which is voting stock. *Id.* Ione L. Graves is the third director and owns .1 percent of the stock, which is also voting stock. *Id.* L. Patrick Mellon owns 75 percent of the stock, his interest is nonvoting. *Id.* The Isis stock subscription agreement of February 29, 1988 precludes Mellon from exercising "any authority or influence whatsoever over the prosecution of the application or the operation of the Corporation." Isis Exh. 1, Attach B, at 2. The agreement prohibits Mellon from owning voting shares, being employed by the station, serving as a director or officer of the corporation. *Id.* The subscription agreement provides that Mellon's interest "shall be passive in all respects." Isis Exh. 1, Attach. B, at 2.

26. Although Mellon is the nonvoting shareholder, he initiated the Isis proposal. Tr. 407. He lives in Norfolk, Virginia where he is Vice President for Programming of TeleCable Corporation. Isis Exh. 5; Tr. 402. Mellon managed a radio station and worked as disc jockey while he was in college. Tr. 405. He has worked for an FCC commissioner and the House Subcommittee on Telecommunications. Tr. 405-06. He learned about the availability of the Santa Barbara facility from his Washington, D.C. counsel. Tr. 406. Someone with the National Urban League, whose name he does not recall, referred him to a Mr. Hatch who suggested Shirley Kennedy as a possible business associate. Tr. 407-08. Hatch knew that Kennedy had applied for a television station license and, according to Kennedy, they participated in some activities together, although she does not know what he does for a living. Tr. 140.

27. Mellon spoke to Kennedy for the first time about a month before the February 29, 1988 application was filed. Tr. 135, 228. Mellon stated that he wanted someone to manage the application process, someone local, someone who could participate financially, and someone who could manage the station. Tr. 408-09. Kennedy is a part-time lecturer at the University of California, Santa Barbara. Tr. 122-23. She has not held a full-time position since 1982 (Tr. 123); the longest time she has ever worked full time is four years. Tr. 134. She has no broadcast experience. Tr. 136.

28. Mellon has applied for a radio station in Richmond, Virginia. He owns 20 percent of the applicant, Virginia Communications Limited Partnership, and is a general partner. He has represented to the Commission that he will work full time at the Richmond facility as that station's general manager and he intends to leave his job with TeleCable if his application is granted. Tr. 411. When Mellon approached Kennedy, the Richmond proceeding had completed a comparative hearing. Tr. 410-11. Mellon did not prevail in the initial decision and he has appealed. *Id.* Mellon also has been a general partner in an applicant for a new radio station in Louisville, Kentucky. Tr. 420. Mellon's limited partner in Louisville obtained the permit when he bought out everyone's interest. Tr. 421-23.

29. When Mellon called Kennedy, he asked her whether she would join him in applying for the Santa Barbara permit. Tr. 136-37. They did not discuss legal organization, ownership of shares, or the amount of financial support Kennedy would need to provide. Tr. 137, 415. During the second telephone conversation, Kennedy told Mellon that she did not have a lot of money to spend on an application "that may be futile" and she did not want too much of a financial "exposure." Tr. 417. Mellon told her to "reserve" her concern about finances. Tr. 416-17. They did not discuss how the applicant would be organized. *Id.* In a third conversation, Kennedy told Mellon that she would be part of the applicant but they did not discuss what kind of entity or ownership arrangement their proposal would have. Tr. 141. Kennedy told Mellon that she would contribute only a few thousand dollars. Tr. 141-42. Mellon agreed to her limitation. Tr. 143. Kennedy represented that, without having met her, Mellon agreed that Kennedy would provide only $2,000 and he would pay application prosecution expenses and construct the station. Tr. 146. He did not ask Kennedy whether she had broadcast experience. Tr. 174. Mellon said he did not know that Kennedy would invest only $2,000 until he met her in Santa Barbara. Tr. 424. Mellon represented that, when they met, they mutually decided Kennedy would work at the station and that she would be paid pursuant to the budget that Kennedy provided him and which they discussed on the telephone. Tr. 425-26. Kennedy cannot remember whether she discussed or reviewed the budget with Mellon; she does not know whether she told him what the cost would be for the station. Tr. 211-12. Kennedy could not remember at her deposition, whether she ever discussed her salary with Mellon but at the hearing she said she had not. Tr. 185. She also just assumed he knew she intended to work at the station at the time the application was filed; they had not discussed it. Tr. 177-80.

30. Kennedy's spouse is retired and he now takes sailing trips which last up to nine months. Tr. 131. Sczudlo Exh. 2. Kennedy visited her husband along the route of a nine month trip he took. *Id.* Mellon said that in his discussions with Kennedy, he made it evident that he would start with at least a majority of the equity for absorbing the prosecution costs and if additional amounts were needed, he would receive an even greater share; Kennedy's share would be 20 to 25 percent. Tr. 442-45. No specific decision about ownership was made until they met with counsel. Tr. 443-45.

31. Kennedy was also contacted, after Mr. Mellon spoke with her, by Delta's Carol Hoffine about joining with her to apply for the Santa Barbara facility. Tr. 144. And they discussed a joint proposal with Mellon. Hoffine called Mellon on February 20 and 21, 1988. Tr. 1312-13; Sczudlo Exh. 7. Hoffine said that Mellon told her that he was discussing an application with Kennedy but that nothing was "set in concrete" at that stage and that there "certainly was room for negotiation." Tr. 1315-16. According to Hoffine, Mellon said he intended to have a jazz format. Tr. 1317. She represents that Mellon also said that he intended to move to California and manage the station. Tr. 1317-18. Hoffine told Kennedy that she talked with Mellon and Kennedy recalls that Hoffine told her she had spoken with him. Tr. 1320, 217-18. Mellon denies he ever spoke with anyone other than Kennedy about joining him in this application. Tr. 418. He claims that he never spoke with Hoffine. Tr. 454. Mr. Mellon made that statement

after he had been informed that Hoffine said in her deposition testimony that she had spoken with him and that he had said he would move to Santa Barbara and manage the proposed station. Tr. 455-56. Mellon knew about Hoffine's testimony at his deposition and there, too, he denied talking with her and he denied stating that he would move to Santa Barbara and manage the station. Tr. 457-58.

32. Sylvia Curtis, who is a librarian at the University of California, Santa Barbara, was asked to join the application by Kennedy. Tr. 148. Kennedy believed Curtis to be "knowledgeable," experienced in broadcasting, and thought Curtis would enhance the application because she is a minority female. Tr. 148, 149-50. Kennedy did not know whether Curtis had broadcast management experience. Tr. 149. It was understood that Curtis would work at the station. Tr. 155-56. Curtis was told by Kennedy that Mellon would finance the proposal and that she would need to provide $2,000. Tr. 318-19. Curtis did not inquire about her share of the proposal for that amount; she did not ask about why she had to provide $2,000 or whether she could pay more or less. Tr. 320. She could not recall whether ownership was discussed. Tr. 321-23.

33. Curtis said she spoke with Mellon by telephone before deciding to join in the application. Tr. 323. She did not recall that she asked him about his or her interest. Tr. 324-25. The only thing about him that she knew was that he would provide "as much money as was necessary" to pursue the license. Tr. 325-26. Within a few days after Kennedy spoke with her, Curtis agreed to join in the proposal. Tr. 320-21. It was her understanding that she and Kennedy would manage the station, Mellon would provide the money, and she would need to invest $2,000. Tr. 328-29.

34. The fourth Isis owner, Ione Graves, Kennedy's niece, was asked by Kennedy to participate the week before the application was filed. Tr. 373, 1745. Graves' participation was necessary because Isis needed a third director to qualify as a Subchapter S corporation. Tr. 176. Graves paid $4 and she became an owner of one share and a director. Tr. 370. Graves did not talk with Mellon before joining but she believed he was "reputable." Tr. 389. She also understood that he would finance the proposal, although she did not see any information about him or his financial statement. Tr. 389-90.

35. Just before the application was filed, Kennedy and Curtis met with their Los Angeles counsel to determine ownership. Mellon participated by telephone in the decisions reached at that meeting. Tr. 158, 272-73, 329. While it was decided that Mellon would get a 75 percent interest, Kennedy could not recall how his interest was determined. Tr. 163-64. She did know that she did not suggest it. *Id.* Curtis did not recall that ownership was ever discussed before the meeting and she could not recall what was discussed about it then. Tr. 321-23, 330-31. Kennedy paid $2,036 to Isis, Curtis $1,960, Mellon $12,000 and Graves $4. Tr. 202-03, 205, 370; Isis Exh. 1. Mellon also agreed to lend money as necessary for prosecuting the application. Isis Exh. 1, Attach. B, at 2; Graziano Exh. 6. Kennedy did receive a financial statement from Mellon a few days before the application was filed. Tr. 169. Graves saw it after the application was filed. Tr. 390. Mellon has lent Isis money for prosecuting the application and Isis has issued a promissory note for each amount lent. Tr. 205-06; Isis Exh. 1; Sczudlo Exh. 6. The loans are not guaranteed by Isis' voting shareholders and need not be repaid if Isis does not receive a grant. Tr. 449-51.

36. Kennedy has always told Mellon what the money was going to be used for when she requested a loan. Tr. 226, Graziano Exh. 6. Kennedy has also informed Mellon about transmitter site problems, sent him Commission orders about the case, and discussed the station's entertainment format with him. Tr. 195-96, 183-84, 273; Sczudlo Exh. 3 and 4. Kennedy said it would be a jazz format. Tr. 185. Isis' minutes reflect that Mellon was to pay counsel's bills directly but Kennedy said she had no recollection of that requirement. Tr. 199-201. Sczudlo Exh. 5, at 2. Mellon had undertaken engineering for the proposal before the group was formed and Kennedy was asked by Mellon to pay that bill. Tr. 201-02, 288.

37. Curtis is the chief financial officer and treasurer of Isis but she believes these positions to be "incongruous" because she has limited business and financial experience. Tr. 334, 335. She is not certain but she thinks these positions were assigned to her by Los Angeles counsel. Tr. 359. She has, however, opened a checking account and sometimes makes deposits. Tr. 360. Isis has a bookkeeper who set up books and keeps the accounts. Tr. 336. Kennedy has completed tax forms and at times maintained the checkbook. Tr. 336. Kennedy receives Isis' bills and she reviews the books with the bookkeeper. Tr. 338. Kennedy makes all requests to Mellon for money and also makes deposits to the checking account. Tr. 254, 340. Curtis was unfamiliar with the notes Isis issued to Mellon for his loans. Tr. 341-42.

Integration

38. Shirley G. Kennedy, who owns 50.9 percent of the voting shares proposes to work full time, 40 hours per week, as the general manager of the station. Isis Exh. 2, at 1. She will oversee all aspects of station operations. *Id.* Kennedy will leave her job at the University of California at Santa Barbara and change her other activities to accommodate her position at the station. *Id.*

39. Kennedy's promise is enhanced by the following factors: Since 1972, Kennedy has resided in Goleta, California, which is located within the 1 mV/m contour of Isis' proposed station. Isis Exh. 2, at 1. Kennedy has engaged in the following civic activities: From 1971-78, she was a board member of the Santa Barbara NAACP. She was active in the organization. *Id.* During 1985-86, she was a member of the Santa Barbara County Public Access Advisory Committee. She met with the committee and the public during her membership. *Id.*, at 2. In 1985-89, Kennedy was coordinator of the Martin Luther King, Jr. Committee. *Id.* As coordinator, she was responsible for professional and volunteer workers, writing a grant proposal, publicity and securing sponsors of events. *Id.* From 1982-86, she was a founding board member of Afro-American Community History Project in Santa Barbara; from 1976 to the present, Kennedy organized and curated numerous art exhibitions in Santa Barbara; from 1972 to the present, Kennedy was the organizer and curator of six film series in Santa Barbara; in 1975, she organized a study release program between the University of California at Santa Barbara and Lompoc Federal Correction Facility; in 1984, Kennedy was the founder and board member of the University of California at Santa Barbara Combined Black Studies Fund; from 1982-86, she was founder and board member of the Black Alumni

Club at the university; during 1981-86, Kennedy was a trustee of the university's foundation; in 1988, she was a campaign worker and delegate to a national political convention; she worked on a local congressional campaign in 1990; and she received awards for her community service in 1989. *Id.* Kennedy is a female African American. Isis Exh. 2, at 1.

40. Sylvia Y. Curtis has promised to work full time, 40 hours per week, as the program director. Isis Exh. 3, at 1. She owns 49 percent of the voting stock of Isis. Curtis will oversee the development and implementation of programming policy, including management of on-air personnel. *Id.* She will end her current employment. *Id.*

41. Curtis has lived in Santa Barbara since 1982. Isis Exh. 3, at 1. She has participated in the following activities: From 1983-85, she was a member of the Santa Barbara City Revenue Sharing Tax Commission; beginning in 1986 and continuing to the present, she has been a member of the Santa Barbara Solstice Board which organizes an annual community parade; from 1985 to the present, Curtis has been a member of the Martin Luther King, Jr. Organizing Committee in Santa Barbara; 1985 to the present, Curtis has been a member of the Affirmative Action Committee of Santa Barbara School Districts; and she has been a board member of the Santa Barbara Women's Political Committee since 1982. Isis Exh. 2, at 1-2.

42. During 1972-73, when she was a student, Curtis worked 5-10 hours per week at KALX-FM, Berkeley, California; she was a programmer. Isis Exh. 3, at 3. From 1982 to the present, she has worked 10 hours per week as a programmer at KCSB-FM, Santa Barbara. *Id.* Ms. Curtis is a female African American. Isis Exh. 3, at 1.

43. Ione L. Graves owns .1 percent of Isis' voting stock. She proposes to work full time, 40 hours per week, as the sales manager. Isis Exh. 4, at 1. She will oversee development and implementation of a sales policy and the activities of a sales force. *Id.* She, too, will end her current employment. *Id.* Graves will move to Santa Barbara if Isis' application is granted. *Id.* She is a female African American. *Id.*

Mass Media Interests

44. Neither Isis nor its stockholders has any cognizable mass media interests. Isis Exh. 5.

Auxiliary Power

45. Isis will install auxiliary power at both the transmitter site and at the studio to insure continuous operation in the event of any power outage. Isis Exh. 6.

Joelmart

46. Joelmart is a corporation with one class of common stock. Joelmart Exh. 1, at 1. Joel Silverman and Eileen Martin Silverman, who are married, each own 500 shares of Joelmart's 1,000 authorized, issued and outstanding shares of voting common stock. *Id.* Joel Silverman is Joelmart's President and Chief Financial Officer and a director. Eileen Martin Silverman is Vice President and Secretary of Joelmart and a director. *Id.*

47. The Silvermans first learned of the availability of the Santa Barbara facility when Ms. Silverman saw an article in the newspaper and brought it to Mr. Silverman's attention. Tr. 499, 624. They determined that this would be a worthwhile opportunity to look into. *Id.* Each talked to people they know who have experience in broadcasting to determine what is involved in operating a radio station. Tr. 499-500, 624-25. One of the people contacted by the Silvermans was Steven Lerman of Leventhal, Senter & Lerman, Joelmart's communications counsel. Tr. 504. Mr. Lerman and Mr. Silverman have known each other for 20-25 years. *Id.*

48. The Silvermans currently are looking for a business that will allow them to continue working together in the Santa Barbara community. Tr. 613, 616. When they first moved to Santa Barbara, they had anticipated working in the real estate business. Tr. 615-16. However, the real estate business in Santa Barbara proved to be difficult. Tr. 615-20. The Silvermans have worked together for almost twenty years in the food equipment remanufacturing and real estate businesses. Tr. 506-09, 613. Their business affairs are integrated, and they function as a unit, one filling in where the other leaves off. Tr. 506, 637.

49. After discussing the optimal structure for the applicant with each other and with counsel, the Silvermans decided to form a corporation. Tr. 505-06, 626-27. They have done business previously in the corporate form. Tr. 627. Joelmart's corporate counsel maintained at his office certain organizational documents from the "corporation kit" originally signed in February 1988. Tr. 528. However, these documents were subsequently misplaced, and relevant portions of the "corporation kit" they had previously utilized were readopted on October 25, 1990. Tr. 527-29.

50. The Silvermans prepared the Joelmart application, with Ms. Silverman completing the EEO portion, and Mr. Silverman completing the remaining portions, except for the engineering. Tr. 549-50, 553, 626. Ms. Silverman saw drafts of the application. Tr. 552, 626. During the time when the application was being prepared, Ms. Silverman was spending most of each day studying for the California bar examination, which was held on February 23-25, 1988. Tr. 550, 669-70. The Silvermans have discussed the status of the Joelmart application on a regular basis since it was filed. Tr. 669.

51. Mr. Silverman prepared a budget for the proposed facility, based on personal experience, discussions with various people in the broadcast business, and the advice of Joelmart's counsel and engineering firm. Tr. 502-05, 538-41, 550-52. He also discussed certain aspects of the budget with Ms. Silverman. Tr. 551. A copy of this budget was provided to the City Commerce Bank, along with a joint financial statement. Tr. 536-37, 541-42. City Commerce Bank provided Joelmart with a financing letter for its proposed Santa Barbara station. Graziano Exh. 16. At the time City Commerce Bank was approached about financing for Joelmart, the Silvermans had funds on deposit with that bank. Tr. 531, 615. In addition, Mr. Silverman had met with officers of City Commerce Bank on several occasions to discuss a possible business relationship. Tr. 531, 613-15. A corporate account for Joelmart was subsequently opened with City Commerce Bank. Tr. 629-30; Graziano Exh. 8. The Silvermans are both authorized to write checks on the Joelmart account and both do so. Graziano Exh. 8.

52. The Silvermans began to locate a tower site for Joelmart by visiting the Hall of Records in Santa Barbara with a topographical map that had been provided by their engineer and locating the various sites indicated on the map, and then relating the sites to the owners. Tr. 667-68. Mr. Silverman ultimately obtained from one of those site owners, Mr. Graham, reasonable assurance that his site

could be used in the event the Joelmart application is granted. Tr. 554-56. Both Mr. and Ms. Silverman were involved in the discussions with Mr. Graham. *Id.*; Tr. 668.

53. Mr. Silverman established the public inspection file for Joelmart at Sterling Escrow. Tr. 553. When Sterling Escrow moved, the Silvermans placed a public notice in the Santa Barbara News Press indicating that the Sterling Escrow office had moved, and that the public file of Joelmart was still with Sterling Escrow. Tr. 669. Ms. Silverman also placed a public notice with the same newspaper reporting that the Joelmart application had been designated for hearing. Tr. 668.

Integration

54. Mr. and Ms. Silverman will work full time, a minimum of 40 hours per week on a day-to-day basis, at the station. Joelmart Exh. 2, at 1; Joelmart Exh. 3, at 1. Ms. Silverman will work as the station's general manager, with day-to-day oversight and supervisory responsibilities for all aspects of station operation, and a particular focus on programming, personnel, and ensuring compliance with FCC rules and regulations. Joelmart Exh. 2, at 1. Mr. Silverman will work as the station's business and sales manager, with day-to-day oversight and supervisory responsibilities for all aspects of the station's sales and business departments, including direct supervision of sales and business personnel and the setting of policies for those departments. Mr. Silverman will also participate with his wife in establishing overall station policies through his role as an officer and director of Joelmart. Joelmart Exh. 3, at 1-2.

55. The Silvermans are currently self-employed as investors. Joelmart Exh. 2, at 2; Joelmart Exh. 3, at 2. Their existing investments require approximately 3 hours per week each of their time. *Id.* None of their existing investments require active, day-to-day management. *Id.* The Silvermans currently spend approximately another 15 hours per week each seeking out and analyzing potential investment opportunities. *Id.* If the Joelmart application is granted, they will discontinue the time they spend seeking out and analyzing potential investment opportunities, and will continue to devote no more than 3 hours per week to existing investments. *Id.*

56. The Silvermans testified about the time they spend in investment-related activities. Tr. 557-58, 650-52. Their existing investments are: (1) a 22-unit apartment building which has an on-site manager to handle day-to-day management (Tr. 574-76); (2) a warehouse in which the tenant oversees maintenance (Tr. 572); (3) an industrial property (which includes a warehouse and office building) in which the tenants oversee maintenance (Tr. 572-74)[3]; (4) a small commercial rental with one tenant and one subtenant (Tr. 571); (5) a recently completed single-family home that is for sale (Tr. 571-72, 576); and (6) a lot on which a single-family home will be built and then sold. Tr. 572, 605. The management of these properties involves occasional phone calls and depositing checks on a monthly basis. Tr. 570-76, 652. The Silvermans also manage six to seven trust deeds that they currently hold, which involves depositing checks every month. Time spent pursuing new investments involves the evaluation of potential new trust deed loans. Tr. 576-79, 605-06, 641-46, 652

57. The Silvermans have resided in Hope Ranch, California, which is just outside the city limits of Santa Barbara, and within Joelmart's predicted 3.16 mV/m service contour, from December 1986 to the present. Joelmart Exh. 2, at 2-3; Joelmart Exh. 3, at 2-3. They relocated to the Santa Barbara area from Los Angeles. *Id.* During a transition period between December 1986 and approximately June 1987, the Silvermans maintained a residence in Los Angeles while it was being sold. *Id.* During that period of time, Ms. Silverman spent approximately 35 percent of her time, and Mr. Silverman approximately 50 percent of his time, at the Hope Ranch residence. *Id.* In the event that Joelmart's application is granted, the Silvermans will continue to reside in Hope Ranch on a full-time basis. *Id.*

58. Mr. Silverman has been a member of Congregation B'nai B'rith in Santa Barbara since 1987, and has participated in various temple activities on a volunteer basis since that time. Joelmart Exh. 3, at 3. These activities include organizing various youth activities. Tr. 609-10. Mr. Silverman helped organize and host a visit from several hundred young members of a Houston congregation. *Id.*

59. Mr. Silverman has been a member of the Santa Barbara Board of Realtors since February 1988 and of the Santa Barbara Rental Property Association since at least January 1989. Joelmart Exh. 3, at 3. His membership in these groups is motivated in part by his interest in learning about the Santa Barbara community and local politics. Tr. 592-94.

60. Mr. Silverman devoted time in the summer of 1990 as a volunteer to help victims of the "Painted Cave" fire which destroyed over 600 homes in the Santa Barbara area. Joelmart Exh. 3, at 3.

61. Ms. Silverman has been a member of the Vieja Valley PTA in the Hope School District (which is within Joelmart's proposed service area) since September 1987, including service as the PTA Secretary during the 1988-89 and 1989-90 school years. Joelmart Exh. 2, at 3. She is a Vice President of that organization for the current school year. *Id.* She has also served as chairman of fundraisers. Tr. 663.

62. Ms. Silverman has been a member of Congregation B'nai B'rith in Santa Barbara since 1987, and has participated in various temple activities on a volunteer basis since that time, including membership in the Temple Sisterhood and service as an adult supervisor for the Temple Youth Choir. Joelmart Exh. 2, at 3.

63. Ms. Silverman has served since March 1990 on the Vieja Valley Site Council, a board which oversees and evaluates programs at the Vieja Valley School. Joelmart Exh. 2, at 3. Since September 1990, she has served as the Director of the Site Council.

64. Ms. Silverman has been an active volunteer with Mothers Against Drunk Driving ("MADD") for Santa Barbara County since June, 1990. Joelmart Exh. 2, at 3-4. She has been MADD's representative at monthly judicial meetings since May 1990. *Id.* In August 1990, she was nominated to MADD's Advisory Board for Santa Barbara County.

65. Ms. Silverman has been a member of the Junior League since June 1989, and is currently serving on the League's Teenage Pregnancy Prevention Committee ("TAPP") for 1990-91. Joelmart Exh. 2, at 4. Her current activities include preparing a manual to be used nationwide to assist other cities in the country in establishing TAPP programs. Tr. 666. She also arranges for drivers, aides and counselors for the teenage girls, as well as get

togethers and seminars. *Id.* Before her work with TAPP, Ms. Silverman worked with the League's PACE unit, which maintains a baby-sitting center for teenage parents, thus enabling the teenagers to attend high school. Tr. 665. Ms. Silverman has been a member of the California Bar since August 1988 and the Santa Barbara Bar Association since January, 1990. Joelmart Exh. 2, at 4. Ms. Silverman is female. Joelmart Exh. 2, at 4.

Mass Media Interests

66. Neither Joelmart nor Mr. or Ms. Silverman has any interest in any medium of mass communications. Joelmart Exh. 1; Joelmart Exh. 2, at 4; Joelmart Exh. 3, at 3.

Auxiliary Power

67. If its application is granted, Joelmart will install emergency power generators at the studio and at the transmitter site of its Santa Barbara FM station to ensure that the station will be able to remain on the air in the event of a public utility failure. Joelmart Exh. 4.

Broadcasting

68. Broadcasting is a corporation with only voting stock. There are two stockholders: John Graziano, who owns 90 percent of the stock and is president and a director, and Paul Graziano, who is secretary, chief financial officer, a director and owns 10 percent of the stock. Broadcasting Exh. 1, at 1. The application indicated that Paul Graziano owned his shares with his spouse, Katina, and that she was a vice president. On February 21, 1989, Katina Graziano's interest in the shares was transferred to Paul Graziano. P & T Exh. 5. Broadcasting amended its application to report the change in ownership on August 8, 1990. P & T Exh. 6. Broadcasting stated in the petition that the Grazianos had been divorced. *Id.*

69. John and Paul Graziano discussed acquiring a broadcast station for some time before they applied for the Santa Barbara facility. Tr. 694, 703. They intended to own the station together. Tr. 693. They also intended that Katina Graziano would have a role, although they did not make specific plans for her to work at the station. Tr. 694-95.

70. John Graziano was aware that Paul Graziano would not work full time at the station from the outset. Tr.704. John Graziano wanted Paul Graziano to be involved in the station because of his knowledge about business and because he can trust him. Tr. 704-05. John Graziano is providing the money and will manage the station. For those reasons, he owns 90 percent of the stock. Tr. 693-94. Paul Graziano received his 10 percent in Broadcasting in return for assisting with the application and for his advice. Tr. 707, 709.

Integration

71. John Graziano proposes to work full time, 40 hours per week, as the general manager of the station. Broadcasting Exh. 3. He will be responsible for establishing and implementing station policies and day-to-day station operations. *Id.* He will resign his current employment. *Id.* Paul Graziano proposes to work 25 hours per week as the business manager. Broadcasting Exh. 4. He will oversee station financial and legal matters. *Id.* Paul Graziano will reduce his law practice to the extent necessary in order to work at the station. Broadcasting Exh. 4, at 1. He works in a firm with four lawyers where he does estate planning and administration. Tr. 733-34, 737. During the last two years he billed between 1400 and 1500 hours and he managed the firm for 5 to 15 hours per week. Tr. 727-29. His partners have been told of his plans and they have agreed to his reducing his billable hours to 1200 per year or 23 hours per week. Broadcasting Exh. 4, at 1; Tr. 728. He has hired two paralegal assistants to help him with his practice. Tr. 736. He also is no longer the managing partner. Tr. 727-28. He has promised to work seven days a week at the station to meet his commitment. Tr. 726.

72. Paul Graziano has lived in Santa Barbara since 1981. Broadcasting Exh. 4, at 1. Mr. Graziano belongs to the Santa Barbara County Bar Association and he is Chairman of the Association's Probate Section. *Id.* He frequently speaks to community groups about probate matters. Tr. 721-23. For the last nine years, he has spoken to community groups on Law Day. Broadcasting Exh. 4, at 1; Tr. 720-21. He belongs to the Channel Cities Club, a local organization which arranges for speakers to address its members. Broadcasting Exh. 4, at 2. He has also been involved in local political campaigns. *Id.*; Tr. 724-25.

73. John Graziano will move to Santa Barbara. Broadcasting Exh. 3, at 1. Mr. Graziano has worked at broadcast stations from 1975 to 1980 and from October 1988 to the present, his positions have been in management. Broadcasting Exh. 3, at 1, 2, 3.

Auxiliary Power Proposal

74. Broadcasting will provide auxiliary power supplies at both the studio and the transmitter sites. Broadcasting Exh. 5.

Diversification

75. Neither Broadcasting nor its principals hold any interest in the media of mass communications. Broadcasting Exh. 2, at 1.

Wodlinger

Integration

76. Patricia Wheeler Wodlinger is applying in her own name as a sole proprietor. Wodlinger Exh. 1. Ms. Wodlinger proposes to work full time, 40 hours per week, as the station manager. Wodlinger Exh. 3, at 2. She will have full control over hiring, firing, budgets, programming, sales, engineering and all other day-to-day activity. *Id.* Her spouse, Kevin Wodlinger, will be the sales manager. Wodlinger Exh. 3, at 2.

77. Ms. Wodlinger and her spouse, Kevin, currently own equal shares of Monett Communications which is the licensee of two broadcast stations. Tr. 758-59. In approximately 1985, the Wodlingers decided that they would move. Tr. 759. They filed a joint application for Tucson, Arizona in 1985. *Id.* On March 1, 1988, Ms. Wodlinger filed an application for the Santa Barbara facility. *Id.* Even though the Tucson application was still pending, Mr. Wodlinger agreed to move to Santa Barbara. Tr. 760. While they did not dismiss their Tucson application, Ms. Wodlinger explained that it had bad engineering. *Id.* And it was eventually dismissed for engineering defects. Tr. 763. Ms. Wodlinger claims to have had "little or nothing to do" with the Tucson application. Tr. 759, 764. About 25 percent of the funds for the application have come from a joint account she shares with her spouse. Tr. 762.

Ms. Wodlinger has discussed the Santa Barbara proposal with her spouse and he is vitally interested. *Id.* Ms. Wodlinger solicits her spouse's opinion on what should be done with regard to the Santa Barbara application. Tr. 763. Monett Communications has a history of doing business with the banker who will finance this proposal. Tr. 770-71. She and her spouse have maintained a regular business relationship. *Id.*

78. Ms. Wodlinger lived in Santa Barbara between 1976 and 1980. Wodlinger Exh. 3, at 1. She will move to Santa Barbara if her application is granted. Wodlinger Exh. 3, at 2. From 1976 to 1978 and from 1980 to the present, Ms. Wodlinger has worked full time at broadcast stations. Wodlinger Exh. 3, at 1-2; Tr. 754-55. In 1979 and 1980 she worked part-time at broadcast stations. *Id.* Wodlinger is female. Wodlinger Exh. 1.

Diversification of Mass Media

79. Wodlinger is 50 percent owner of Monett Communications, Inc., licensee of Stations KRMO and KKBL, Monett, Missouri. Wodlinger Exh. 2, at 1. The other 50 percent is owned by her spouse, Kevin M. Wodlinger. *Id.* Wodlinger Exh. 2. Ms. Wodlinger has pledged to divest her interest in the stations in the event of a grant of the Santa Barbara application. *Id.* As of the date for amendments as of right, there had been no explicit divestiture pledge made by Mr. Wodlinger.

80. Wodlinger and her husband hold a construction permit for a new FM station, KZRK, at Cassville, Missouri. That interest will also be divested in the event of a grant of the Santa Barbara application. Wodlinger Exh. 2, at 1.

81. Mr. Wodlinger, in a fiduciary capacity, as Trustee, owns 25 percent of the stock of Wodlinger Broadcasting Company of Naples, Inc., licensee of WIXI, Naples Park, Florida and 25 percent of the stock of KKLO, Inc., licensee of KKLO, Leavenworth, Kansas. Wodlinger Exh. 2, at 1. There was no explicit divestiture pledge made with respect to the WIXI ownership. There was a timely divestiture pledge with respect to KKLO.

Auxiliary power proposal

82. Wodlinger will install auxiliary power generators at the transmitter and studio locations. Wodlinger Exh. 4.

Chanel

83. Chanel is a general partnership with two partners, Cynthia J. Carter, who is a 51 percent owner, and Laura J. Simpson, who owns 49 percent. Chanel Exh. 1, at 1. The division of interests is not equal because Ms. Carter advanced the greater amount of the initial $10,000 capitalization. Tr. 813-14. It was, however, always intended that the partners would contribute on a 50/50 basis for expenses. Tr. 813, 868. By the time of the hearing, they had each contributed equal amounts. Tr. 813, 869. Ms. Carter stated that she wanted the managerial authority for the station. Tr. 869. They also have represented that they will jointly manage the station. Chanel Exh. 3, at 1. The partnership agreement provides in §8.1 in the Operations/Management section that Cynthia Carter can outvote Laura Simpson in setting station policy and operating the station. Chanel Exh. 6, at 11; Tr. 814-15. Section 8.1 requires a 67 percent majority before selling or merging the station. Chanel Exh. 6, at 11; Tr. 816. Ms. Carter believes that this provision provides that a sale or merger requires unanimous consent. Tr. 870. She agrees that that would not be the case if more partners were added. Tr. 817. Section 9.1 of the partnership agreement allows any partner to transfer her interest to a family member without the other's consent. Tr. 908. The partnership agreement was written and signed at the same time that Carter and Simpson discussed the efforts of Carter's brother to obtain financing. Tr. 849.

84. Ms. Simpson states that, while Ms. Carter could outvote her on day-to-day management issues (Tr. 814-15), they have agreed on management capacities and theories. Tr. 815-16. Ms. Simpson said she wanted a sale or merger dependent on a 67 percent vote to avoid being outvoted should a sale or merger present itself. Tr. 817. In a station she owned previously with her family, she had been outvoted. Tr. 855.

85. Ms. Carter certified Chanel's application on February 26, 1988 at a meeting in Santa Barbara with Ms. Simpson. Tr. 818, 871, 873. Ms. Simpson prepared the EEO statement, estimated the costs, retained the consulting engineer, assisted the engineer in locating a transmitter site and arranging for its use. Tr. 810, 811, 858. Simpson and Carter prepared the program service statement together. Tr. 810. Ms. Simpson also attempted to obtain financing from the Truckee River Bank. Tr. 820. It is at that bank that Chanel has its bank account. Tr. 821. Carter and Simpson met with Steve Mattern at Truckee River Bank but the bank did not give them a loan because their loan request exceeded the bank's lending limit. Tr. 912-15.

Integration proposal

86. Cynthia Carter proposes to work full time, 40 hours per week, as station manager and director of station operations. Chanel Exh. 3, at 1. Ms. Carter will oversee community responsive programming and implement an EEO program. *Id.* She will end her involvement with The Waitress Olympics. Chanel Exh. 3, at 1. Laura Simpson proposes to work full time, 40 hours per week, as the general manager and sales manager. Chanel Exh. 4, at 1. She will be responsible for the day-to-day operations of the station and supervise sales and the sales staff. Chanel Exh. 4, at 1. She will also maintain compliance with the FCC rules. *Id.*

87. Laura Simpson lived in Santa Barbara from 1979 to 1981 and from 1983 to 1984. Chanel Exh. 4, at 1, 2. Ms. Simpson will move to Santa Barbara. Chanel Exh. 1, at 1; Chanel Exh. 4, at 1. Cynthia Carter will move to Santa Barbara. Chanel Exh. 3, at 2. From April 1980 to July 1988 and from October 1988 to October 1989, Ms. Carter was employed at broadcast stations. Chanel Exh. 3, at 2. From December 1984 to January 1988 and from March 1988 to the present, Ms. Simpson has been employed at a broadcast station. Chanel Exh. 4, at 2. Both Chanel principals are female.

Diversification of Mass Media Ownership

88. Neither Chanel Broadcasting nor its partners have any mass media interests. Chanel Exh. 2.

Auxiliary Power

89. Chanel will install auxiliary power facilities at the studio and transmitter site. Chanel Exh. 5.

P & T

90. P & T is a North Dakota corporation with two stockholders, Jane N. Pearson, president and only director, who owns 50 percent of the shares, and Yoseph M. Tedros, vice president, secretary and treasurer, who owns the remaining 50 percent of the shares. P & T Exh. 1, at 1.

91. Jane Pearson contacted P & T's lawyers and she has carried out the corporation's business, according to Yoseph Tedros. Tr. 972, 997. She executed and filed P & T's application and amendment. Tr. 950; Benns Exh. 6. She typed, filed, and executed P & T's May 24, 1988 articles of incorporation and paid the filing fee out of her personal funds. Tr. 952-53. Pearson arranged and paid for P & T's two public notices and set up its public file. Tr. 977-81. It was Jane Pearson's brother-in-law, Bruce Pearson, that told Pearson and Tedros about the availability of the Santa Barbara channel. Tr. 989. Although discussions were held about whether Jane Pearson's spouse and brother-in-law should be owners, it was decided that only she and Tedros should be. Tr. 989-90. Tedros did not know why Bruce and Frank Pearson were not included. Tr. 994.

92. Nevertheless, Bruce Pearson found an engineer for P & T and provides advice to P & T. Tr. 990. He and Frank Pearson also attend P & T meetings. *Id.* When P & T's owners have questions, they call Bruce Pearson up and ask him what is the best way to proceed. *Id.* He helped Jane Pearson complete the application because he knew more. Tr. 998. Frank Pearson advised P & T about the FAA issue concerning P & T's site. Tr. 993. He did this because he is Jane Pearson's spouse. On his own, Frank Pearson paid one of the legal bills and told Tedros what he had done. Tr. 991-92, 995-96.

93. Jane Pearson will not move to Santa Barbara, she will not work at the station but she will be president of P & T and carry out that role. Tr. 948. She is the "principal executive officer" and is responsible for "supervising and controlling the business affairs of the corporation." Tr. 982; Benns Exh. 6, at 7. P & T's only business will be operating the station. Tr. 983. Jane Pearson is also the only director, although the by-laws call for two, and she is responsible in that capacity for the management of the business and affairs of the corporation. Tr. 985; 983; Benns Exh. 5, at 4. Ms. Pearson has the authority to remove Tedros as an officer "whenever in [her] judgment the best interest of the corporation will be served thereby." Benns Exh. 5, at 6; Tr. 983-84. Ms. Pearson will be responsible for the EEO program. Benns Exh. 6, at 3; Tr. 1002-03. Ms. Pearson, as a matter of practice, has done what needs to be done without consulting Tedros. Tr. 981.

94. Tedros has not fulfilled his duties as P & T's secretary/treasurer. He is responsible for giving notice of meetings but he has only given notice on one occasion. Benns Exh. 5, at 7; Tr. 971. He is responsible for corporate funds, but he never signed a check until after the question was raised at his deposition. Tr. 978-79. P & T did not establish a bank account until October 1990. Then Jane Pearson opened one at the bank where her spouse is employed. Benns Exh. 5, at 7; Tr. 973. The corporate address is at Pearson's home. Tr. 1017. All bills are sent there and she maintains a checkbook. Tr. 975; 999-1000.

95. Until August 1990, five months after this case was designated for hearing, Tedros and Pearson, did not elect officers, shares were not issued and the by-laws were not prepared. Tr. 967-68, 953. Tedros paid for his stock on the day the HDO was released. Tr. 956. They did these things to prepare for the hearing. Tr. 968. Tedros said that Pearson was responsible for the application process and he would run the station. Tr. 1012, 1016. He was unable to help with the application because his businesses required travel. *Id.* Tedros believes that this arrangement does not make sense in the long run. Tr. 1020. And while he no longer travels, and has not since June 1990, the arrangment continues. *Id.* He said it would change shortly. *Id.* Tedros views his failure to become a director or act as treasurer a "major oversight." Tr. 1008. Tedros and Pearson have not discussed it "with great seriousness." Tr. 1008-10. He never thought about his role in these respects until after the issue was raised at his deposition. Tr. 1019.

Integration

96. Yoseph Tedros proposes to work full time, 40 hours per week, as the general manager of the station. P & T Exh. 3, at 1. He will be in charge of the day-to-day decision making at the station. *Id.* Mr. Tedros will move to Santa Barbara and end all other business activities. *Id.* He is an African American. *Id.*

Diversification of Mass Media Ownership

97. Neither P & T nor any of its stockholders has any interest in the mass media. P & T Exh. 2.

Auxiliary Power

98. P & T will install auxiliary power facilities in order to permit continued operations if the power fails. P & T Exh. 4.

SBCI

99. SBCI, a California corporation, has one stockholder, L. Janedora Howell, who owns 1,000 shares of voting stock and 750 shares of nonvoting stock. Tr. 1029; SBCI Exh. 1. Ms. Howell is the only officer of SBCI. SBCI Exh. 1. She and Gloria J. Moore and William White, Jr. are directors. SBCI Exh. 1, 8, 11, and 12. Originally the nonvoting shares were owned by Dean and Zoe Hazen but Ms. Howell purchased their shares in 1989. Tr. 1042, 1064-65, 1139.

100. SBCI's Articles of Incorporation were filed and its by-laws adopted on February 25, 1988. SBCI Exh. 8, 10; Tr. 1139-40. Section 4 of SBCI's by-laws authorize three directors. SBCI Exh. 9, at 2; Tr. 1141. Ms. Howell was elected director on February 25, 1988. SBCI Exh. 8; Tr. 1139-40. SBCI directors "hold office until the next annual meeting and until their successors have been elected and qualified." SBCI Exh. 8; Tr. 1140. Article II, Section 4 of SBCI's by-laws provides that the number of directors can be changed by the holder of the majority of the shares. SBCI Exh. 9; Tr. 1141. Section 6 of SBCI's by-laws provides that if the shareholders fail at a shareholders' meeting to elect the number of directors to be voted for at that meeting, the directors will serve until a director has been elected and qualified. SBCI 1989 and 1990 certificates of action indicate that White and Moore were reelected di-

rectors. Joelmart Exh. 6 and 8. While the documents are signed by L. Janedora Howell as 100 percent voting stockholder, no mention is made about whether Ms. Howell was reelected or elected a director. *Id.* Ms. Howell represented that her signature as a director may have been included on another page (Tr. 1032), that she did not think she needed to elect herself (Tr. 1032), that her counsel did not tell her to get her own signature (Tr. 1034), that it was an oversight (Tr. 1036), and that the certificates were generated by simply changing the date and redoing a previous version of the same document in her computer. Tr. 1038-39.

101. SBCI's directors manage the business and affairs of the corporation and exercise all corporate powers. Tr. 1128. SBCI Exh. 9, at 1. Ms. Howell stated that each director has an equal vote. Tr. 1128-29. Ms. Howell reports to the directors about SBCI's application and they ask her questions about it. Tr. 1129.

102. Ms. Howell found out about the availability of this frequency from materials sent to FM radio station KFOX, Redondo Beach, California, where she worked. Tr. 1040-41. Ms. Howell's spouse is the general partner and 32.3 percent owner of Torrance Media Partners, licensee of KFOX. SBCI Exh. 2. Although he has owned the KFOX facility for twelve years and had been the station manager, Ms. Howell did not know if Mr. Howell currently has a position with a title at KFOX. Tr. 1046. He does work there at least twice a month. Tr. 1046, 1122. Mr. Howell has also worked at KNTF, Ontario, California. Tr. 1074. Ms. Howell stated she was unsure what position her spouse held at KNTF; at one point she said he was the manager. *Id.* She did not know why Mr. Howell quit his position at KNTF in mid-1989. Tr. 1045-46. Ms. Howell claims she never discussed applying with Mr. Howell because they do not do business projects together. Tr. 1072. Despite that representation, they have jointly managed an apartment building and worked together at both KFOX and KNTF. Tr. 1072-73. Ms. Howell concedes that joint assets have been pledged for the proposed station. Tr. 1081-82. Ms. Howell represents that Mr. Howell has said he will not work at the Santa Barbara station. Tr. 1073. She does not know why he said it. *Id.*

103. Ms. Howell said she initially sought investors to help finance the proposal because it would require a large investment. Tr. 1056. She selected John Dean Hazen and Zoe Hazen. Tr. 1057. Ms. Howell had had infrequent social contact with the Hazens before they purchased their stock. Tr. 1052, 1044. They were business associates of Mr. Howell. Tr. 1042-44. Mr. Howell helped them buy KNTF and he worked at their station after they purchased it. Tr. 1042-44; 1045. Ms. Howell claims that she never spoke with Mr. Howell about selling the Hazens' stock and she did not discuss with him her decision to repurchase their stock. Tr. 1131. Ms. Howell stated that she told the Hazens at the outset that she wanted to retain control. Tr. 1047-48. At her deposition, Ms. Howell said that she never discussed with the Hazens how SBCI would function or whether they could participate. Tr. 1060-64. Ms. Howell said she decided she did not want to work with Ms. Hazen and she asked for the stock back. Tr. 1065. Ms. Howell claims she gave the Hazens no explanation. Tr. 1064-65, 1138. While Ms. Howell claims she told the Hazens they could not be involved, notes prepared by Ms. Howell during the time the application was prepared suggest that she discussed a name for the applicant with them and that Mr. Hazen suggested counsel. Tr. 1065-68, 1069. Ms. Hazen said that she did not know that SBCI's counsel also served as the Hazens' counsel, although she was aware that her counsel also represented KFOX. Tr. 1041-42. Initially, she said she did not know whether her counsel represented her spouse (Tr. 1041-42) but later in the proceeding she said he did. Tr. 1124. SBCI also has the same corporate counsel as Mr. Howell. Tr. 1080.

104. Ms. Howell said that her spouse did not help her in any way with any aspect of her application. Tr. 1074. She did admit that he helped her obtain information about backup power. Tr. 1075-77; Joelmart Exh. 13. He also agreed, she said, to her use of joint assets to finance the proposal. Tr. 1082. Mr. Howell also took deposits to the bank for her. Tr. 1078-79. When Ms. Howell obtained a loan letter from Security Pacific Merchant Bank, the bank referred to its reliance on principals and stockholders. Tr. 1105-10; Joelmart Exh. 14. Ms. Howell represents that the bank did not rely on the other stockholders. She said that the bank must have been protecting itself if additional principals were added. Tr. 1104, 1082-83, 1106-07.

Integration Proposal

105. Ms. Howell proposes to work full time, 40 hours per week, as general manager. SBCI Exh. 3, at 1. She will supervise all aspects of station construction and operation, including firing and hiring. *Id.* Ms. Howell will resign her current employment and, if necessary, discontinue her real estate exam tutoring service. *Id.*

106. Ms. Howell will move to Santa Barbara. SBCI Exh. 3, at 2. Ms. Howell is a female African American. SBCI Exh. 3, at 2. Ms. Howell worked as an administrative assistant from February 1988 through December 1989 at KFOX and April 1988 to November 1989 at KNTF. *Id.* She spent about 20 hours per week on station business, although some of it was done at her home. Tr. 1112, 1113.

Diversification of Mass Media Ownership

107. Ms. Howell and SBCI do not have mass media interests but Ms. Howell's spouse, Bancroft J. Howell, is the general partner and 32.3 percent owner of Torrance Media Partners, the licensee of KFOX-FM, Redondo Beach, California; Mr. Howell will divest that interest if Ms. Howell receives a grant. SBCI Exh. 2.

Auxiliary Power

108. SBCI proposes to install auxiliary power for a power outage. SBCI Exh. 4.

Sczudlo

109. Deborah Lynn Sczudlo is an individual applicant. Sczudlo Exh. 1, at 2. She learned about the availability of the Santa Barbara channel from her brother, Walter Sczudlo, when she overheard him talking about Docket 80-90 in the spring of 1985. Tr. 1168-70. Walter Sczudlo is an applicant for a facility in Killington, Vermont. Sczudlo Exh. 1, at 6-7. Ms. Sczudlo asked her brother to send her information about channels made available through Docket 80-90. Tr. 1170. While there are documents that refer to an entity called SBar Broadcasting, which identify Sczudlo as president (Tr. 1173; Chanel Exh. 8, at 1; Chanel Exh. 9, at 1; and Chanel Exh. 10, at 1), Ms. Sczudlo said she always intended to apply as an individual and she never incorporated SBar. Tr. 1171,

1173. Walter Sczudlo recommended his counsel in the Killington proceeding to Ms. Sczudlo. Tr. 1172-73. When Ms. Sczudlo's mother applied for Albuquerque, New Mexico, she, too, hired the same counsel. Tr. 1173. Ms. Sczudlo saw a notice in the newspaper about this channel and the filing date. Tr. 1174.

Integration proposal

110. Ms. Sczudlo proposes to work full time, 40 hours per week, as the general manager of the station. Sczudlo Exh. 1, at 2. She will oversee the management and operation of the station, formulate policies, hire, and supervise. *Id.*, at 3.

111. Ms. Sczudlo represents that she has had a residence at 770 Via Airosa in Santa Barbara since 1969. Sczudlo Exh. 1, at 3. The address is in the unincorporated part of Santa Barbara county. *Id.*, at 1. It is within the proposed 1 mV/m contour of Sczudlo's proposed station. *Id.* The houses at 770 Via Airosa are owned by Ms. Sczudlo's parents. Tr. 1151, 1228. When she is there, she stays in the guest house. Tr. 1228, 1239-40. She currently lives with her spouse at 5117 Gowan Road, Las Vegas. Tr. 1162.

112. Ms. Sczudlo was born in Fairbanks, Alaska on December 20, 1956. Sczudlo Exh. 1, at 1; Tr. 1151. She resided in Fairbanks until 1969. *Id.* Her parents still reside in Fairbanks. Tr. 1155. From 1971 to 1975, Ms. Sczudlo returned to Fairbanks during the summer to work at Arctic First Federal Savings and Loan Association. Tr. 1155. From August 1975 to January 1976, Ms. Sczudlo lived full time in Oakland, California, where she attended college. Tr. 1152. From 1978 to 1982, she attended the University of Colorado in Boulder, Colorado. Sczudlo Exh. 1, at 1; Tr. 1152-53. Her resume lists extensive travel, including six European tours, but Ms. Sczudlo maintains she returned to Santa Barbara during the summer when she was in school. Tr. 1153, 1156. She claims she did not return to Fairbanks during the college summer recesses. Tr. 1155. She lived and worked in Denver, Colorado from 1982 to 1985. Sczudlo Exh. 1, at 4; Tr. 1157. She purchased a car and registered it in Colorado. Tr. 1157. In September 1985, she returned to Santa Barbara and lived in her parents' guest house. Tr. 1159. From December 1987 to February 1989, Ms. Sczudlo spent every other weekend in Las Vegas. Tr. 1160. In April 1989, Ms. Sczudlo moved to Las Vegas. Tr. 1160. She now is employed there. Sczudlo Exh. 1, at 2; Tr. 1235-36, 1246.

113. Ms. Sczudlo did not file a California tax return for 1989. Tr. 1245-46. She did not file one in Nevada because Nevada has no personal income tax. Tr. 1241. She filed California returns for 1987 and 1988. Tr. 1241, 1247. She filed a 1990 franchise tax return in California for a corporation called Sun's Edge. Tr. 1245. Ms. Sczudlo claims that she is a registered voter in California. Tr. 1166. But she did not vote in the two elections held in 1990. Tr. 1166.

114. Beginning in 1972, except during 1982 to 1985, Ms. Sczudlo raised money for the American Cancer Society. Sczudlo Exh. 1, at 5. She raised funds for her high school during 1985 to 1988. *Id.* From 1969-88, Ms. Sczudlo participated in the Santa Barbara Fiesta. *Id.* During 1985-88, Ms. Sczudlo donated to the Humane Society; from 1976 to 1978, she volunteered at the Santa Barbara Girls' Club for two to three hours per week. *Id.* Ms. Sczudlo is female. *Id.*

Auxiliary Power

115. Ms. Sczudlo will install auxiliary power facilities at both the studio and transmitter locations for her station. Sczudlo Exh. 1, at 6.

Diversification of Mass Media Ownership

116. Sczudlo has no mass media interests. Sczudlo Exh. 1, at 6.

Benns

117. Ying Hua Benns is an individual applicant. Benns Exh. 2. All of the funds for the prosecution of her application came from a joint account she has with her spouse, William Benns. Tr. 1263. That account is called Communications Services and receives income from the investments held by the Benns. Tr. 1264. While Ms. Benns works at the Tennessee stations, she receives no salary but is reimbursed for expenses. Tr. 1261. She also receives a distribution of profits. Tr. 1262. Ms. Benns stated that Mr. Benns retired at the end of 1988. Tr. 1256. She believes he will not provide advice about the proposed Santa Barbara station because he is not as active or as smart as he used to be. Tr. 1281. Ms. Benns did say that if her spouse gave her free advice (he is a professional engineer), she would listen. *Id.* But, she added, he is "not sharp like he used to be" and it would depend on her judgment of the worth of his advice on matters unrelated to engineering. Tr. 1282. Ms. Benns has been married to Mr. Benns for 20 years and during that time they have always lived in Chattanooga, Tennessee. Tr. 1283-84.

Integration Proposal

118. Ms. Benns proposes to work full time, 40 hours per week, as general manager of the station. Benns Exh. 2, at 1. She will supervise station personnel, have final decision-making authority, and oversee day-to-day operations. *Id.*

119. Ms. Benns has promised to move to Santa Barbara. Benns Exh. 2, at 1. She has represented that she will resign from her current broadcast management positions, although she will spend as much as 10 hours per week on her other broadcast interests. Benns Exh. 2, at 3.

120. Beginning in 1981, Ms. Benns worked part-time at WFLI(AM). Benns Exh. 2, at 1. In October 1982, she became general manager of the station and at that time, she had general supervisory authority over WJTT(FM). *Id.* In 1986, WJTT was sold. *Id*, at 2. In May 1987, she became station manager of WFLI-TV, where she works 40 hours per week. *Id.* She also supervises WFLI(AM). *Id.* Ms. Benns did not provide any time estimate for her work at WFLI after October 1982. Ms. Benns is a female Asian American. Benns Exh. 2, at 1.

Auxiliary Power Proposal

121. Ms. Benns proposes to install auxiliary power at the studio and transmitter site. Benns Exh. 3.

Diversification of Mass Media Ownership

122. Ms. Benns owns 70.7 percent of WFLI, Inc., her spouse owns 24.1 percent. Benns Exh. 1. She is an officer and director. *Id.* That company owns and operates WFLI(AM), Lookout Mountain, Tennessee and WFLI-TV, Cleveland, Tennessee. *Id.* Ms. Benns is the licensee of

LPTV station W39AW, Chattanooga, Tennessee, which rebroadcasts the programming of WFLI-TV. *Id.* Mr. Benns was the general partner and 5 percent equity holder of WHYW Associates, the licensee of WMYG-FM, Braddock, Pennsylvania until August 1990. *Id.*

123. The Tennessee and Pennsylvania stations are over 2,000 miles from Santa Barbara. Benns Exh. 1, at 2. There is no other television station in Cleveland, Tennessee. *Id.* Chattanooga, Tennessee has four commercial and one noncommercial television stations. *Id.* Both Chattanooga and Cleveland have cable service available. *Id.*, at 3. WFLI(AM) is the only station in Lookout Mountain. *Id.*, at 3. There are, however, numerous (more than 5) reception services from AM and FM stations in all the surrounding communities. *Id.* at 3. Chattanooga has two daily newspapers and Cleveland has one daily. *Id.*, at 4.

Delta

124. Delta is a corporation which, when the articles of incorporation were filed on February 26, 1988 with the California Secretary of State, was authorized to issue two classes of stock. Delta Exh. 4, Attach A, at 2. Three thousand shares were to be common stock and 7,000 shares were to be preferred shares. *Id.* The Articles did not state whether voting rights would attach to the shares. *Id.* On April 26, 1988, the articles were amended to provide that the shares would instead be designated common stock, Class A, of which there would be 3,000 shares, and Class B, of which there would be 7,000 shares. *Id.*, at 5. The amended articles did not establish what rights would attach to the two classes of common stock but permitted limitations to be placed on the shares by corporate resolution. *Id.* A written consent to corporate action, signed by the directors on April 12, 1988, a date preceding the filing of amended articles, provides that the Class B common stockholders may not become actively involved in Delta's media business, *Id.*, at 11. Carol J. Hoffine is the president/chief financial officer, director and sole holder of the 3,000 shares of Class A common stock. Delta Exh. 2, at 1. Jonatha Kentro is secretary and director but she owns no stock. *Id.* Thomas P. Moyer, Jr. owns the 7,000 shares of Class B common stock. *Id.* He purchased his shares from John P. Franklin, Jr. in the spring or summer of 1990, apparently after this case was designated for hearing. Tr. 1413, 1572. Delta filed its application on March 1, 1988. But as late as February 20, 21, and 22, 1988, Ms. Hoffine had made no decision about who she would apply with. Tr. 1312-17. She spoke with Shirley Kennedy, who is a principal in Isis around February 20, 1988 and with Patrick Mellon, another principal in Isis, after February 21, 1988. Tr. 1312, 1313, 1315, 1323. She said she rejected a proposal made by Mr. Mellon because she did not want to get involved with someone she did not know. Tr. 1318. She added that she wanted to be involved with someone from the Santa Barbara area that she had at least heard of, like Shirley Kennedy. Tr. 1319. During the eight day period from February 21, 1988 to March 1, 1988, before Delta filed, Ms. Hoffine said she was looking for investors to join with her and an attorney to assist in filing the application. Tr. 1324-25. She said, at her deposition, that she had talked with John Franklin, originally Delta's other stockholder, as early as January 1988. Tr. 1326. At the hearing, she said was talking with Franklin and Kennedy about an application in late January or early February 1988. Tr. 1326. She called Ms. Kennedy because she is an African American and Hoffine believed that quality would strengthen her proposal. Tr. 1327. Hoffine and Kennedy had lunch to discuss an application with Delta's John Franklin. Tr. 1406.

125. When Ms. Hoffine was questioned at the hearing about Delta's organization, she said it was a corporation with voting and nonvoting stock. Tr. 1411. But she agreed that that was not accurate, the stock is actually designated Class A and B. *Id.* She did not know how much Mr. Moyer paid for his shares. Tr. 1413. Ms. Hoffine was repeatedly asked whether there was a document designating the Franklin and Moyer shares nonvoting. She could not remember whether such a document existed at the time application was made. Tr. 1414. When she reviewed the documents in the record that are dated 1988, she could not point to any document which designated shares voting and nonvoting. Tr. 1416-18. Ms. Hoffine initially said the shares were issued in early March 1988 but, when she was shown minutes dated April 12, 1988, she agreed that that was the date the shares were issued. Tr. 1419. She also agreed that no mention was made in the minutes about Mr. Franklin's shares being nonvoting. Tr. 1420. Ms. Hoffine conceded that no document designated Mr. Franklin's shares as nonvoting. Tr. 1420-23. Ms. Hoffine represented that a document she signed after August 21, 1990, which purports to limit the voting rights of the Class B shares, was in existence on April 12, 1988. Tr. 1425-26. She also conceded that she was not aware of the document limiting the Class B shares to nonvoting status until August 1990. She has no memory of the document existing in 1988 and the document itself states, "this action was taken effective April 12, 1988." Tr. 1427-28. Neither Franklin nor Moyer signed the consent or any other document restricting their voting rights. Tr. 1423-24.

126. Ms. Hoffine claims that between February 21, 1988 and March 1, 1988, she was contacted by L. Patrick Mellon, a principal in Isis, about joining him in his application. Tr. 1313-14. But she decided instead to join with John Franklin; sometime after February 22, 1988 and before March 1, 1988, Delta was organized and the application was completed. Tr. 1316-17.

127. Ms. Hoffine contributed $3000 for her shares and that is her only financial obligation. Tr. 1412. Mr. Franklin contributed $7,000 but he was not completely sure that his shares were nonvoting shares, although he was 99 percent sure. Tr. 1552.

128. Ms. Hoffine read about the Santa Barbara facility in the newspaper. Tr. 1437. Ms. Hoffine was also told about the Santa Barbara facility by Jim Evans (Tr. 1438) and he may have told her about Mr. Franklin's interest in the facility during that conversation. Tr. 1439. Hoffine explained that Evans talked with Franklin and told him that she would call him. Tr. 1443. Evans told Franklin about Hoffine, the cost of the facility, and represented that radio stations are valuable. Tr. 1535-36. Evans explained the comparative process, including the preference system, to Franklin. Tr. 1539-40. Evans also gave Hoffine financial information about prosecuting the application. Tr. 1440. Mr. Franklin relied on Evans, not Hoffine, for the information about the proposal. Tr. 1445, 1542.

129. Ms. Hoffine probably met Mr. Franklin around 1965 to 1977 when she worked at a television station and Mr. Franklin was working as a television station engineer at another station. Tr. 1536. They knew each other well enough to say hello on the street. *Id.* He said, between

1977 and 1988, they had not seen or talked with each other. Tr. 1536-37. Ms. Hoffine said they talked several times a year during that period. Tr. 1442-43, 1508-09. No one told Mr. Franklin what Ms. Hoffine had done since 1977 and he did not ask about her background. Tr. 1539-40. They never discussed the return that might result from his investment. Tr. 1548.

130. They did not negotiate their ownership shares, according to Mr. Franklin. Tr. 1540-41. He assumed he would pay the prosecution costs but they did not discuss them. Tr. 1541-42. Mr. Evans provided Mr. Franklin with an estimate of the cost of the proceeding and, if more were needed, Mr. Franklin said, he would make a decision when that occurred. Tr. 1545-46, 1549. Ms. Hoffine stated that Mr. Franklin was to pay all costs and the money he paid would be a loan. Tr. 1450-51, 1491-92. She claimed they discussed the loan but it was never put in writing. Tr. 1450-51. Mr. Franklin said he never had that discussion (Tr. 1546) and that his spouse objected to using their joint funds. Tr. 1551. He said he never told Hoffine about his spouse's objection. *Id.*

131. Evans, who explained the transaction to Franklin, was, at the time, an applicant for Montecito, California, which is adjacent to Santa Barbara. Tr. 1535. Evans and Franklin are 50-50 owners of a two-way radio company, a pager company, and an antenna site rental company. Tr. 1530-34. They are both active in the businesses they own. *Id.* Mr. Franklin has no other passive interests. Tr. 1534-35.

132. Delta's counsel also represents Mr. Evans and Mr. Franklin in their communications interests. Tr. 1445-46, 1532. Ms. Hoffine represents that she hired Delta's engineer without assistance. Tr. 1448. But Delta's engineer also represents Evans. Tr. 1446-47. She represents that she had no suggestion or help in selecting her engineer. Mr. Evans was not compensated for assisting Ms. Hoffine. Tr. 1450. Ms. Hoffine claims that she spoke with the bank initially in mid-February 1988. Tr. 1455. When it was called to her attention that she had not even decided to apply until after February 22, 1988, she conceded that it had to be after February 22. Tr. 1456. The letter from City Commerce Bank to Delta is dated February 26, 1988. When Ms. Hoffine was presented with it, she said she talked with the bank sometime between February 22 and February 24, 1988. Tr. 1457.

133. Ms. Hoffine said she will not personally guarantee the bank loan (Tr. 1463), although at deposition she was not sure. *Id.* She said that when she looked at the bank letter she remembered that it was the station's assets that would secure the loan. Tr. 1465. Nevertheless, she did not know whether Mr. Moyer or Mr. Franklin would personally guarantee the loan. Tr. 1466-67.

134. Ms. Hoffine and Mr. Franklin spoke about the proposal a dozen times before Mr. Franklin sold his stock to Mr. Moyer. Tr. 1510. They spoke about the other applicants and the transmitter site. Tr. 1511, 1512, 1548. She kept both Mr. Franklin and Mr. Moyer informed about the status of the application because they had invested. Tr. 1514-15, 1548. Mr. Franklin enlisted his son to help copy things for Delta. Tr. 1549, 1555. Mr. Franklin said that Ms. Hoffine had casually mentioned that he would not play a role in prosecuting the application. Tr. 1546. At his deposition, he said they had never discussed his role in prosecution. Tr. 1547-48. Mr. Franklin enjoys building stations but he had not given a lot of thought to whether he would participate in building Delta's station because the possibility was too far away. Tr. 1552. He said he intended to address that issue when the permit was granted. *Id.*

135. Ms. Hoffine said that she personally located and signed up Mr. Moyer as a stockholder. Tr. 1482. She did not know him before he bought Mr. Franklin's stock. Tr. 1496, 1560. Mr. Moyer said that on the basis of a single telephone call from Ms. Hoffine he decided to invest. Tr. 1560. He knew of her reputation from a former colleague. Tr. 1562-63. He said he paid $14,000 for his stock and then, when shown the bill of sale, he said that he paid $6,000 for the stock. Tr. 1571. He has also lent the applicant $30,000 to $50,000. Tr. 1575. Mr. Moyer does not know how much Ms. Hoffine has contributed. Tr. 1561. He also made no check of Ms. Hoffine's background. Tr. 1563. Mr. Moyer has not discussed with Ms. Hoffine potential profitability, looked at financial projections or even evaluated possible station value. Tr. 1568. He is kept advised by Ms. Hoffine about the progress of the application. Tr. 1568-69.

136. Ms. Hoffine, at her deposition, believed that Mr. Franklin's contributions were to capital but at the hearing she said they were loans. Tr. 1487-88. Mr. Moyer and Ms. Hoffine have a December 1990 loan agreement about amounts contributed by Mr. Moyer to prosecute the application. Tr. 1475, 1564, 1575-76. Mr. Moyer claims he had no involvement in the loan agreement provisions. Tr. 1567-68. The agreement provides that Ms. Hoffine has no obligation to repay Mr. Moyer's loans if Delta does not obtain the permit. Tr. 1478-79. Ms. Hoffine also said she has an agreement with Mr. Moyer that prohibits him from selling his stock without her agreement. Tr. 1499-1500. She also has agreed not to sell her stock without his consent. Tr. 1502-03. Ms. Hoffine said shortly before giving that answer that she had never discussed with Mr. Moyer his right to sell his shares and she also said she did not have to seek his permission to sell hers. Tr. 1500-01.

Integration Proposal

137. Ms. Hoffine proposes to work as the station's general manager on a full-time basis, 40 hours per week. Delta Exh. 3, at 1. Ms. Hoffine will set personnel policies, hire and fire, and supervise all station personnel. Delta Exh. 3, at 1. Ms. Hoffine will also continue to work as a communications consultant for Leonard H. Roller, Inc. Communications Management. *Id.* This will take 1-3 days, 3-6 times a year. *Id.*

138. Ms. Hoffine states that she has been a resident of Santa Barbara since 1976. Delta Exh. 3, at 2. Ms. Hoffine altered that claim and stated that, prior to 1984, she lived in Santa Barbara five days a week. Tr. 1432-33. During the 1976-84 period, she registered to vote in Ventura County where her condominium is located at Thousand Oaks. Tr. 1433. Her drivers license also showed that she used the Thousand Oaks address prior to 1984. *Id.* Her resume, between 1981-1984, also listed her Thousand Oaks address. Tr. 1435. Thousand Oaks is not within Delta's proposed service area. *Id.* In February 1988, although Ms. Hoffine maintains she rents out her Thousand Oaks condominium, she made telephone calls from there on six different dates. Sczudlo Exh. 7. Tr. 1436-37. Ms. Hoffine could not remember when she rented her Thousand Oaks apartment to someone else. Tr. 1435.

139. From 1980 to the present, Ms. Hoffine has belonged to local groups which include the Tri-County Broadcasters Association (1980 to the present), Access Theater Support (1982 to present), Council of Christmas Cheer (1980 to present), Tres Condados Girl Scout Council (1985 to present), Santa Barbara Rescue Mission (1987 to present), Santa Barbara Ad Club and Chamber of Commerce (1986 to present), Film Commission of Santa Barbara County (1989), Tres Palmas Homeowners' Association (1985 to present), Member of Public Information Communicators (1986 to present), Representative for 2nd Supervisorial District on the Public Access Advisory Committee (1987 to the present), Member of the Board of Christian Singles Coalition (1987 to present), Member of Lobero Theatre Foundation (1988) and Member of the Girl Scouts (1985 to present). Delta Exh. 2, at 2-3.

140. Ms. Hoffine worked at broadcast stations during 1976-84, four months in 1975, and 1965-68, 1969-74. Delta Exh. 3, at 3. Ms. Hoffine is female.

Auxiliary Power

141. Delta proposes auxiliary power at its studio and transmitter. Delta Exh. 4.

Diversification of Media

142. Neither Delta nor its owners have any mass media interests. Delta Exh. 1.

Comparison of Coverage

143. The following chart provides the total area and population within each applicant's 1 mV/m contour. Jt. Eng. Exh., at 5-6.[4]

Applicant	Population (1980 Census)	Area (Sq. km.)
SBCI	195,293	2,025
Isis	184,569	2,206
Joelmart	184,569	2,206
Broadcasting	184,569	2,206
Wodlinger	184,569	2,206
Benns	184,569	2,206
P & T	184,337	1,916
Sczudlo	180,748	1,529
Chanel	172,533	1,226
Delta	172,231	1,594

Other Available Services

144. During daytime and nighttime hours, all of the areas that each of the applicants would serve already receive five or more aural services. Jt. Eng. Exh., at 5. None of these applicants provides coverage to underserved areas (served by fewer than five aural services), white areas (areas that presently receive no service) or grey areas (areas that presently receive only one service).

CONCLUSIONS

Issue 1: P & T's tower proposal will not be hazardous to air navigation.

145. The FAA has found that the site designated by P & T will not be a hazard to air navigation. On this issue P & T is technically qualified.

Issue 2: Chanel is financially unqualified and it did not certify in good faith that it had reasonable assurance of a bank loan.

146. Chanel did not certify that it was financially qualified until three months after its application was filed. Chanel estimates that it will need $400,000 to construct and operate, which it will finance with a loan from the Texas Commerce Bank in Arlington, Texas. Chanel is owned by Cynthia Carter and Laura Simpson. They do not live in Texas and they do not have a business relationship with the Texas Commerce Bank. Ms. Carter's brother, Dr. Richard Carter, is a customer of Texas Commerce Bank and lives in Arlington, Texas. Dr. Carter asked his account officer at the bank to provide a letter of reasonable assurance to Chanel. (Ms. Carter did not ask her brother for help until after the application was filed.) TCB issued a letter to Chanel on March 31, 1988, which was sent to Chanel's counsel. Counsel rejected that letter because he believed it did not comply with the Commission's reasonable assurance standard. He then spoke with Dr. Carter's account officer about how to write a supportable letter. Dr. Carter's account officer, D. Keith Forrester, testified that the letter was an accommodation to Dr. Carter. Mr. Forrester understood from talking with Dr. Carter that the loan would never be funded. The record reflects that TCB never intended to examine Chanel's proposal or fund a loan to Chanel.

147. The first letter from TCB was signed by Mr. Forrester and the second letter was signed by Forrester and David A. Jackson, another bank officer. Neither one of them reviewed any information about Chanel's proposal or its principals. The bank had not decided who the borrower would be. When Dr. Carter originally spoke with Mr. Forrester about the letter, they did not discuss the terms of the loan and they did not discuss whether Dr. Carter would co-sign for the loan. They had only one conversation before the April 12, 1988 letter was issued. The TCB officers did not even know whether Chanel was a corporation or partnership.

148. Chanel has not demonstrated that it had any reason to assume it had reasonable assurance for the $400,000 it needed to finance its proposal. The record indicates that the bank believed it was just issuing a letter to a group it did not know as a favor to a customer. When Chanel certified, it knew or should have known that it was not financially qualified. The testimony indicates that Chanel still does not have reasonable assurance. Chanel's representations about its financial qualifications have not been made in good faith. Chanel is not financially qualified.

Issue 3: Sczudlo is financially unqualified and she did not certify in good faith that she is financially qualified.

149. Sczudlo has been unable to establish that she was financially qualified when she certified her qualifications or that she currently is. She did not demonstrate that the bank letter she relied on provided reasonable assurance within the test provided by the Review Board in *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 1988 (1991). Ms. Sczudlo obtained a letter from the Bank of Montecito when the County Savings Bank, where she maintained a corporate account, told her they did not finance broadcast proposals. The Bank of Montecito was not familiar with Sczudlo's assets, credit history or her business plan when it issued the letter she relies on.

150. Ms. Sczudlo provided Phil Morreale, Assistant Vice President of the Bank of Montecito, with a copy of her financial statement and the bank did a credit check on Ms. Sczudlo. But she did not provide Mr. Morreale with a written budget (in fact she had no written budget) or a business plan.

151. Ms. Sczudlo knew what the bank letter should say and she provided Morreale with a draft which included an interest rate, term for the loan and specifically identified collateral. But the bank did not include these items in the letter it wrote to her. She suggested that the bank state that it was familiar with her financial capabilities. The bank did not include that representation; instead, the bank was only willing to state it was familiar with her plan to apply for the permit. Mr. Morreale said he did not have sufficient information about Sczudlo's financial capabilities to make the statements she requested. Sczudlo also requested that the bank state that while the letter was not a legally binding commitment, it was their present intention to make a loan subject to various conditions. The bank refused to make that statement because, as Mr. Morreale explained, the bank did not have the necessary information on which to base a present intention to make a loan.

152. Sczudlo first claimed that the February 29, 1988 letter from the Bank of Montecito included all the terms and conditions under which the loan would be made but after this issue was designated she said that the interest rate, term, and specific collateral were not included but discussed "in depth" with Mr. Morreales. She maintains that she did not insist on those items being included in the bank's letter because it would never be shown to the Commission. Mr. Morreale disagreed with Sczudlo's testimony. He said all he did was discuss with Sczudlo the general lending policies of the bank. He explained that the lack of specific detail in the bank letter was deliberate because he did not have Sczudlo's financial and business plan and other relevant information. That prevented the bank, he said, from determining what kind of collateral would be required. The bank intended by its letter only that it would consider a loan request in the future. Mr. Morreale represented that Sczudlo had no reason to expect that the bank would lend her money.

153. When this issue arose and it became apparent that Szcudlo did not have reasonable assurance from the bank, she attempted to get the bank to provide precise terms. The bank refused to do so and, furthermore, explained that it was only "vaguely familiar" with her interest in obtaining a license and that if she supplied the proper information, it would review her request. When Sczudlo read the bank's view of its action in its letter to her, she asked the bank to delete those statements, which it did. There is nothing in either letter from the bank which confirms Sczudlo's claim that the necessary elements of reasonable assurance were discussed, let alone agreed to. Moreover, Ms. Sczudlo asserts that there has been a large misunderstanding with the bank and she claims she is in a quandry. There is, she concedes, no understanding with the bank; they are at loggerheads. It should be noted, however, that Sczudlo did not concede their disagreement until she was confronted with documents she failed to produce. Ms. Sczudlo claims she was ill and misplaced them. Those documents were produced by the bank and revealed the unsettled nature of Sczudlo's arrangments with the bank.

154. It is apparent that Sczudlo knew what was needed to establish her financial qualifications from the outset. She provided a letter to the bank to insure that a proper understanding would be evidenced. She also knew that the bank was unwilling to provide the assurances she sought. Nevertheless, she has maintained that the bank provided the necessary reasonable assurance. There is no objective evidence to support that claim. The bank has directly contradicted her claim of an oral agreement and correspondence she withheld shows there was no agreement. Sczudlo has not demonstrated that she acted in good faith when she certified her financial qualifications and she has not shown that she had reasonable assurance from the Bank of Montecito. Sczudlo is not qualified to be a licensee on this record.

155. Sczudlo maintains that she is able to finance the proposal out of her own funds. That claim has been made too late and was not relied on in her application or filings on this issue. Joelmart points out that the assertion is untested and that Sczudlo's reliance on various family related funds is not established. Applicants cannot change their proposals when initial claims fail without establishing good cause. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991). The record reflects that Sczudlo was aware from the date of certification that she could not rely on the Bank of Montecito to lend her money for her Santa Barbara proposal.

Issue 4: The proposal that would, on a comparative basis, best serve the public interest.

156. Three applicants, Chanel, Sczudlo, and SBCI, are unqualified. Chanel and Sczudlo have not established that they are financially qualified and they have not demonstrated that they acted in good faith when they represented to the Commission that they were qualified. SBCI is unqualified because it does not have an antenna site which is acceptable to the FAA. SBCI's petition for leave to amend to designate a new site was denied because SBCI failed to demonstrate good cause for the amendment. *Memorandum Opinion and Order*, FCC 91M-1431, released April 24, 1991. Seven qualified applicants, Isis, Joelmart, Broadcasting, Wodlinger, P & T, Benns, and Delta, will be compared.

Integration of Ownership and Management

Quantitative Comparison

Isis

157. Isis proposes that its three voting stockholders, Shirley G. Kennedy, Sylvia Y. Curtis, and Ione L. Graves, will manage the proposed station on a day-to-day basis. They have promised to work full time, 40 hours per week. The largest stockholder, L. Patrick Mellon, who owns 75 percent of the stock, claims he will not work at the station. Isis has represented that he does not have any control or right to vote. Sczudlo argues that Isis should receive no credit for its proposal to integrate Kennedy, Curtis and Graves because the applicant was "formed in a manner that is irreconcilable with the exercise of sound business judgement." *quoting Royce International Broadcasting*, 5 FCC Rcd 7063, 7065 n. 10 (1990).

158. Sczudlo points to the following facts to support its claim: (1) It is contrary to sound business judgment that Mellon, an experienced lawyer and business person with

extensive communications experience, would provide unlimited funds to three total strangers who have no management experience or background in communications and no financial stake in the outcome of the business. (2) The terms of the loans to be made by Mellon to Isis -- they are open-ended, need not be repaid if Isis does not prevail, and may be amortized over 10 years -- are not consistent with sound business judgment. (3) The minority stockholders agreed to join with him even before they knew what their ownership shares would be.

159. Sczudlo maintains that Mellon told Delta principal Carol Hoffine that he intended to move to Santa Barbara and operate the station with a jazz format. Sczudlo also argues that Mellon was active in prosecuting Isis' application. To support this argument, Sczudlo points out that Mellon was consulted about and controlled expenditures by requiring Kennedy to ask him for money each time it was needed. Sczudlo states that Mellon was consulted about Isis' site problem and that he was sent all FCC releases about the case. Sczudlo maintains that Curtis and Graves should not be credited with their integration pledge because they were not involved in prosecuting the proposal and that Kennedy should not be credited because she has not worked full time since 1982, she withdrew from activities because she felt overburdened, and she frequently travels; in addition, Sczudlo argues that because Curtis has been seeking employment in other places and Graves moved to Philadelphia to pursue other interests, it is unlikely they will work at the station.

160. Isis urges that Mellon is no more than he has represented; someone who is only a passive investor. Isis points to Mr. Mellon's business interests in the East, his status as African American, who could have received a comparative preference on his own, and his one day meeting with Kennedy before they decided to do business together as factual support for the legitimacy of Isis' integration proposal. Isis maintains that Kennedy has exhibited independence from Mellon and acted against his wishes. Isis claims that Kennedy wanted other active participants in the proposal and that, while Mellon did not want other participants, he told her it was her decision. *Citing*, Tr. 152, 439-40. Isis states that the record shows that Kennedy and Curtis contributed funds so they would have a stake in the proposal.

161. Delta's Carol Hoffine testified that Mellon told her he would move to Santa Barbara and manage the station. Isis does not deny that Mellon spoke with Carol Hoffine. However, Mellon claims that he never indicated he would move to California and manage the station. Isis points out that Mellon's business interests are centered in the East and he would not logically have moved to Santa Barbara. Isis notes that Mellon had already promised that he would manage a station in Richmond, Virginia.

162. Isis claims that because Hoffine said she was busy at the time, failed to take notes on the conversation with Mellon, which she did with regard to other conversations about the application process, and because Mellon never told Kennedy or Curtis he wanted to work at the station, Hoffine's account of the conversation with Mellon is inaccurate. Isis also urges that Hoffine's claim is inconsistent with the independent actions that Kennedy took. Isis points to the following facts to support its argument: Kennedy selected a lawyer and engineer, even though Mellon had other suggestions. Kennedy and Curtis decided to organize as a corporation, although Mellon told Kennedy he would prefer a partnership. And Mellon was told he would have to be completely passive and he did not object. Under Isis' stock subscription agreement, Mellon was precluded from participating in management. Kennedy acted independently in locating an antenna site and making a budget.

163. Isis maintains that Kennedy sought money from Mellon as expenses arose of her own volition. While Isis concedes that Curtis, as Isis' treasurer, did not request money from Mellon, it points out she was told about the expenditures by Kennedy. Isis claims the record shows that Curtis did have some participation in maintaining financial records and paying bills. Isis concedes that Mellon was informed about Isis' site problem, but it notes that he did not attend the two latest annual meetings and he was not asked for his views on settlement proposals.

164. With regard to the claim that Kennedy will not effectuate her integration pledge, Isis cites her testimony that she is busier than ever by which it implies that she does not lead an inactive life. In answer to the same argument about Curtis, Isis represents that while Curtis has sought other positions, she is not currently seeking other employment. Graves, Isis notes, moved to Philadelphia only on a temporary basis.

165. Isis' proposal is atypical because the persons who purportedly control the Isis corporation did not initiate the proposal, are contributing only a comparatively small amount of money, and have no particular experience that would make them logical choices to run a new, risky business. They are strong competitors under the Commission's comparative, quantitative and qualitative criteria. The nonvoting stockholder, Patrick Mellon, selected Shirley Kennedy and she elected to join with Sylvia Curtis, who matches and exceeds her comparative strengths. Isis argues that because Patrick Mellon is an African American, he could have competed comparatively if he had intended to operate the station. But he does not equal Kennedy and Curtis' qualitative strengths; they live in the community, participate in civic activities, are women and African Americans, and Curtis has broadcast experience. Mellon is only entitled to a minority preference and, perhaps, some credit for broadcast experience. Mellon could not have promised to work at the station since he had a pending promise to work at a station in Richmond, Virginia.

166. Carol Hoffine was encouraged by Shirley Kennedy to talk with Mellon about joining his venture and, while she decided not to join in Mellon's proposal, she testified that he told her he intended to work at the station in Santa Barbara. There is little question that Mellon has indicated his interest in operating a broadcast station. Previously, he has told the Commission in two different communities that he would like to do so. Isis claims that his business interests are centered in the East and that that indicates he would not move to Santa Barbara. The record does not support that claim; until the case was settled, he told the Commission he would move to Louisville, Kentucky. Isis never addresses how that promise is consistent with its assertion that Mellon never intends to leave the East.

167. Mellon, during his adult life, has always been employed in the communications business; there is no evidence that he has ever been a passive investor or even a communications investor. His investments have been in District of Columbia real estate. In the communications business, he has been an employee or he has promised to manage, not to invest.

168. Isis exaggerates the association between Mellon and Kennedy. Mellon telephoned at someone else's suggestion, a Santa Barbara Urban League member, called Hatch, who he did not know; Hatch recommended Kennedy to Mellon because he knew she had experience applying for another broadcast facility. Kennedy did not know Hatch very well, she did not even know what he did for a living. What Hatch did know, and Mellon cared about, was that Kennedy would make a good comparative applicant and she had experience with the application process. There is no evidence that she could run a broadcast business, or any other business. Of all the owners of Isis, only Mellon had experience in managing a media facility. These facts lend credence to Hoffine's testimony, that only a few days before the application was filed, Mellon told her he would move to California and manage the station if Isis received a grant. Isis argues that Hoffine failed to make notes about Mellon's interest. But that is not inconsistent with the notes she did make. Those notes were records of matters she needed to remember to file a proposal.

169. On the foregoing facts, it would be illogical to conclude that Mellon would not exercise control over the operation of the Santa Barbara station. Were Mellon to act in any other way, as Sczudlo argues, his actions would be irreconcilable with the exercise of sound business judgement. Mellon said he searched for someone who was familiar with the process, local, able to operate the station and willing to participate financially. When Kennedy refused to put up but a token amount of money and then insisted she take on another person who would put up what amounted to half her share, Mellon did not object. Nor are Kennedy and Curtis persons who Mellon had determined could build and manage a station. Kennedy is a part-time university lecturer and Curtis is a librarian. Only Curtis has ever exhibited an interest in broadcasting and that has been as a volunteer. In any event, Mellon did not choose Curtis and there is no evidence that Curtis has ever been interested in owning and managing a broadcast station. The record does not support Mellon's claim that he followed his own set of rational criteria to insure that he was making a good investment.

170. Kennedy's testimony indicates that in her telephone conversations with Mellon, they discussed her concern about how much of a financial risk she would need to take. As a veteran of the application process, she expressed the view that it was unlikely she would be successful. She said Mellon never asked her about whether she had broadcast experience, she could not remember whether they ever discussed her salary, and they had never discussed whether she would work at the station. Mellon testified that they agreed at their first meeting to a salary and that Kennedy agreed to work at the station. Mellon's account is suspect because it repeatedly varies from all other testimony. Neither Kennedy nor Curtis knew how it happened that Mellon obtained 75 percent of Isis' equity. They knew that it happened in the office of their counsel when the corporation was organized. All the reliable preorganizational facts indicate that Mellon will not be just a passive investor. On the other hand, the stock subscription agreement documents preclude Mellon from owning voting shares, being an employee, and serving as a director or officer. The stock subscription agreements also prohibit Mellon from exercising any influence over prosecution of the application. The articles of incorporation provide that Mellon's Class B shares will not have any voting rights.

171. The ownership interests were decided at the meeting which organized the corporation. Curtis and Kennedy were at the Los Angeles office of Isis' attorney. Mellon participated by telephone and Graves apparently did not participate. Neither Curtis nor Kennedy could explain how the size of Mellon's interest was determined. Curtis became the chief financial officer and treasurer of Isis but, she concedes, she has no experience in those areas and was simply selected by counsel to fill the positions. Since the applicant was organized, Kennedy and Curtis have undertaken nominal functions. They have asked Mellon for money and they have paid the bills, which are primarily legal. The post organization activities have been so few it is not possible to determine that Kennedy, Curtis and Graves will have some managerial control. The method in which Isis was organized raises serious doubts about whether Mellon will actually be a passive owner. The arrangement between Mellon and the voting stockholders was entered into long distance. They did not know each other's view on the business, Mellon had met Kennedy only once, and there is no evidence that Kennedy, who Mellon heard about from someone he did not know, could run a broadcast station. The stockholders, before they agreed to join, knew nothing about each other's financial status. *See Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 (1991). There is no evidence that Mellon investigated Kennedy, Graves, and Curtis' business background. His concern was with finding people who would fulfill the comparative criteria and not fall on their face during the application process. Isis argues that Mr. Mellon fulfills those criteria himself but he does not to the same degree and, of course, he is not free to make an integration promise in this proceeding because of the promise he has already made in the Richmond proceeding. Within days of forming Isis, Mellon told another person who was interested in his offer to finance that he would run the station and select the format. Telephone records indicate they probably spoke and Mellon's background lends great weight to the probability that he was expressing his true intentions. Isis is not eligible for integration credit because it has not demonstrated that the circumstances which gave rise to its proposal will result in Mellon being excluded from control.

Joelmart

172. Joelmart is a corporation owned equally by Joel and Eileen Silverman. Joel Silverman proposes to work full time, 40 hours per week, as the station's business and sales manager. Eileen Silverman proposes to work full time, 40 hours per week, as the general manager. Broadcasting argues that Joelmart cannot be credited with the integration proposed because (1) Joelmart did not show that its principals' present business interests would permit them to fulfill their promises; (2) its financial expectations from the station are unrealistic; (3) Ms. Silverman has not acted independently during the application stage; and (4) the testimony given by Joelmart's principals has not been accurate.

173. Joelmart responds to Broadcasting's arguments as follows: Joelmart points out that its principals explained that they each now spend about 18 hours per week on their business activities and that, if a grant is made to Joelmart, they will reduce their business hours to 3 hours each. Joelmart argues that its principals' financial expectations, as characterized by Broadcasting, are inaccurate. Joelmart points out that the Silvermans will continue to

have the same income from investments that they now have. Joelmart states that the Silvermans expect no more than the station will be profitable. The record shows, Joelmart demonstrates, that Ms. Silverman was involved in the application process. She learned about the availability of the facility and told her spouse, she decided with him to form a corporation and to apply; she prepared the EEO section of the application, saw drafts of the other parts of the application, and talked with her spouse about the preparation of the application; discussed the budget; wrote checks; helped locate a tower site; and placed the public notices in the local newspaper. Joelmart's response to the record inaccuracies Broadcasting alleges shows them to be without merit.

174. Joelmart has demonstrated that it is entitled to full credit for the integration promises of its principals, Joel and Eileen Silverman. It has shown that their integration promises are realistic and that there is nothing that will impede them from operating the station.

Broadcasting

175. Broadcasting is a corporation that currently has two stockholders. John Graziano owns 90 percent of the stock; he proposes to work full time, 40 hours per week, as the general manager of the station. His brother, Paul Graziano, intends to work 25 hours per week as the business manager. Paul Graziano now owns 10 percent of the stock, but for integration purposes, he is entitled to only half that amount. On August 8, 1990, after the time for amendments of right (which was June 6, 1988) and 18 months after ownership had changed, Broadcasting notified the Commission that Katina Graziano had transferred her 5 percent interest to Paul Graziano. Broadcasting's statement of this change is inaccurate. It is not correct to characterize Katina Graziano's interest as only a community property interest. Broadcasting told the Commission she was an owner and an officer. The record reflects that it intended that she would have a role in the applicant. Broadcasting failed to timely notify the Commission of the change in ownership and Paul Graziano is entitled to be considered as no more than a 5 percent owner.

176. P & T argues that Broadcasting should not receive any credit because Paul Graziano's promise and role in the applicant is a sham. To support that allegation P & T asserts that Paul Graziano was made a party to the proposal only to permit Broadcasting to receive credit for his local residence; that he had no role in preparing the proposal (although P & T concedes that Paul Graziano's law firm did complete the application); that Paul Graziano made no monetary contribution for his shares; and that Broadcasting has not established that Paul Graziano will be able to meet his 25 hour commitment.

177. Broadcasting urges that, contrary to P & T's claims, Paul Graziano has been an active participant. Broadcasting points out that Paul Graziano assisted in obtaining the bank letters, in selecting the transmitter site, and making arrangements with the site owner. In addition, he helped prepare the application. For his assistance, he received his ownership interest. The record reflects that John and Paul Graziano had always talked about pursuing the proposal together. There is no evidence that Paul Graziano was given his interest solely to benefit from his local residence. Broadcasting argues that Paul Graziano has demonstrated that he can meet his part-time commitment. He has resigned as managing partner of his law firm; he has told his partners about this proposal and they have agreed to him reducing his hours; and he has hired paralegals to assist him in his work.

178. Broadcasting has demonstrated that it is entitled to 95 percent integration credit, 90 percent full time and 5 percent part-time. Paul Graziano has been an active owner and he has developed a detailed plan to effectuate his promise.

Wodlinger

179. Wodlinger is a sole proprietor. She proposes to work full time, 40 hours per week, as the station manager. Her spouse, Kevin Wodlinger, will be the full-time sales manager. Chanel urges that Wodlinger's long-term business relationship with her spouse in the broadcast business undermines any likelihood that she will act alone in controlling and managing the station. *See Richard P. Bott*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989). Chanel points to the following facts of record which support its argument. Wodlinger and her spouse will both manage the station; she has used some joint funds to pay prosecution expenses; and the banker who issued a letter promising to finance the proposal based his conclusion on his experience as a banker to the company Wodlinger and her spouse own jointly, Monett Communications. Record evidence indicates that Wodlinger and her spouse work together as a team; they currently operate and own two broadcast stations, where they occupy the same positions each proposes to work in at the Santa Barbara facility. Moreover, it was a joint decision to leave their current stations and operate a station elsewhere. Initially, they applied together for a frequency in Tucson, Arizona but, after it was discovered that that application was technically defective, they decided that Ms. Wodlinger would apply for Santa Barbara.

180. There never was any question that Mr. Wodlinger would join her in operating the Santa Barbara station. Mr. Wodlinger was routinely consulted about the proposal. It is apparent that the application proposed sole ownership by Ms. Wodlinger because she presented comparative strengths that Mr. Wodlinger lacked. She is female and has lived in Santa Barbara. In the area of broadcast experience where Mr. Wodlinger is comparatively strong, she is also. There is no question, as Chanel argues, that the Wodlingers "have functioned, and will likely function, as a marital unit in the operation" of the Santa Barbara station. *Richard P. Bott*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989). Kevin Wodlinger is not an inactive spouse. *Id.* He proposes to work at the station, is viewed by the bank as a loan guarantor, has contributed funds, and advised about the application. Wodlinger's integration proposal that she will operate and control the station as a sole proprietor is a sham and is not entitled to any integration credit.

P & T

181. P & T is a corporation with two stockholders, who each own half the shares, Jane N. Pearson and Yoseph M. Tedros. Ms. Pearson is a director and president of P & T and Mr. Tedros is an officer but not a director. Only Mr. Tedros proposes to work at the station. He will work full time, 40 hours per week, as the general manager of the station. Benns argues that Tedros' promise should not receive any quantitative integration credit because he does not exercise any control. Benns maintains that Pearson, her spouse and brother-in-law have, from the outset, ex-

ercised all authority. According to Tedros' testimony, Pearson organized the proposal, executed and filed the application and amendment, arranged and paid for the public notices and set up the public file. Tedros could not explain why Bruce and Frank Pearson were not owners. It was Bruce Pearson who told Jane Pearson about the channel and he selected an engineer. Bruce Pearson is consulted about the proposal by Jane Pearson; he helped complete the application. Frank Pearson, Jane Pearson's spouse, advised her about the antenna site and, on one occasion, paid a legal bill without consulting the putative owners of P & T.

182. Ms. Pearson has all of the executive authority in P & T and she has, as a matter of practice, exercised authority without consulting Tedros. She is, despite the fact that the by-laws call for two directors, the only director. She can remove Tedros as an officer if she believes it is in the best interest of the applicant. At the same time, while Tedros has duties as secretary/treasurer, he has not performed them. He has never given notice of corporate meetings and, until the matter was raised at his deposition, he never wrote a check. In fact, P & T never opened a bank account until October 1990. For the first time, five months after this case was designated for hearing, P & T elected officers, issued shares, and prepared by-laws. They took these steps then in order to be able to represent at the hearing that they were a functioning applicant.

183. Tedros claims that the reason he has been a passive owner is because of the need to attend to his current business interests. Nevertheless, after he no longer had the need to devote all his time to his business interests, he did not become an active participant in P & T. He characterized the fact that he is not a director as a major oversight but it is not one that he had seriously discussed with Pearson by the time he testified at the hearing. The showing made by P & T fails to establish a likelihood that Tedros will exercise authority over the operation of the Santa Barbara station. Jane Pearson, who does not propose to work at the station, has legal authority to direct P & T's affairs and, thus far, she has exercised that authority without Tedros. It seems more likely on the basis of this record, that Pearson's spouse and brother-in-law will exercise control with her. P & T has not established that Tedros' management of the Santa Barbara facility will combine management and control. P & T is not entitled to any quantitative integration credit.

Benns

184. Benns is an individual applicant. She proposes to work full time, 40 hours per week, as the general manager of the Santa Barbara station. Delta argues that Benns has not demonstrated that she will fulfill her integration promise. Delta urges that Ms. Benns is committed to running the Tennessee stations, which she owns with her spouse, and that she has failed to keep previously made integration promises. Benns responds that she intends to delegate the operation of the Tennessee stations, WFLI-TV and WFLI(AM). Benns represents but does not support, that she currently delegates to a manager the operation of WFLI(AM). Benns concedes that after making an integration pledge in Cleveland, Tennessee, she withdrew the promise when she was no longer required to integrate to receive a grant. She states that, despite the withdrawal of her promise, she has worked at the station.

185. Delta also argues that the evidence does not support Benns' assertion that she is an individual applicant. Ms. Benns has financed this proposal from a joint account she shares with her spouse, William Benns. They also own a television and an AM station together. Despite their longstanding business relations, Benns maintains that she will act independently of her spouse in Santa Barbara. Although she concedes that she would take his advice about engineering matters and listen to what he has to say about other aspects of station operation. Ms. Benns, in contrast to Wodlinger, contends that Mr. Benns is not going to be involved in the operation of the Santa Barbara station. She claims that, at the end of 1988, nine months after this application was filed, Mr. Benns retired. She attempted to leave the impression that Mr. Benns could not participate even if she wanted him to do so because he is no longer active or "sharp" like he used to be. In January 1991, during this proceeding, Ms. Benns' interest in WFLI, Inc. increased from 21.7 percent to 70.7 percent. William Benns' interest decreased from 73.4 percent to 24.4 percent. There is no record evidence that Mr. Benns is currently active in the operation of the Tennessee stations. There is no refutation of Ms. Benns' assertion that he is now incapable of making intelligent decisions. Ms. Benns claims she will no longer manage the Tennessee stations and that she will spend no more than 10 hours on their business activities. Benns has established that her spouse will not be active in the operation of the Santa Barbara facility and that she will operate the station as a sole proprietor. Benns is entitled to 100 percent integration credit.

Delta

186. Delta is a corporation with Class A and Class B stock. Some time after August 21, 1990, Delta principal Carol Hoffine signed a corporate action which provides that the Class B common stock will have no voting rights. Ms. Hoffine owns all the Class A common stock which the August 21, 1990 corporate resolution provides has all the voting rights. Ms. Hoffine proposes to work full time, 40 hours per week, as the station's general manager. Delta maintains that the Class B stockholder is only a passive investor. It is a claim which is unsupported by any corporate record before late August 1990, including the articles of incorporation. Delta has had two Class B stockholders, John Franklin and Thomas P. Moyer, Jr. It appears that Mr. Franklin owned all the Class B shares from April 12, 1988 until July 12, 1990 when he sold all the Class B shares to Mr. Moyer. There is no legend on the shares or in any of the corporate documents or agreements that restricted the voting rights on Franklin or Moyer's shares until the August 21, 1990 corporate resolution. The Class B shareholder owns 70 percent of the equity while Ms. Hoffine, who purports to have had full control from the outset, has the remaining 30 percent of the equity.

187. The testimony at the hearing was provided after Delta's witnesses knew that the Class B shares had not been legally made nonvoting until after August 21, 1990. The issue now is to determine the likelihood that Hoffine will control and Moyer will be a passive investor. Since April 12, 1988, there has been a corporate resolution which excludes the Class B shareholder from participating in Delta's broadcast business. But the testimony of John Franklin casts doubt on the importance of that resolution to determining control. Franklin decided to finance the

prosecution of Delta's application after discussing costs with his long-time business partner, Jim Evans. It was Evans who talked to Hoffine and urged her to apply. He suggested to her that Franklin would be a possible partner in the venture. At that time, Franklin and Hoffine did not know each other very well and they seldom saw each other. The only reason they were acquainted was because they both had worked for Santa Barbara television stations. Franklin said they did not negotiate their ownership interests and he simply assumed he would pay the prosecution expenses, but the cost was not discussed by Franklin and Hoffine. Hoffine claims that Franklin's contributions were to be a loan and that they had an oral agreement to that effect. Franklin said there had never been any discussion or agreement with Hoffine about the money he provided. Delta concedes there was no written agreement. Hoffine did not know if Franklin, or now Moyer, would have to guarantee the bank loan from City Commerce Bank that Delta relies on.

188. Mr. Franklin, when first asked at his deposition whether he and Hoffine had an understanding about his role in prosecution of the application, said they had never discussed it. At the hearing, when his role had become an issue, he said that she had casually mentioned he would have no role. It is apparent from his testimony that it was not a matter of great importance since he viewed his skill as being able to construct stations, not prosecuting an application. On the subject of whether he would build Delta's station, he said he had not given it a lot of thought because the possibility was too far away. However, in his view, it was not a closed matter or something he believed prohibited by his owning Class B shares since he said he intended to address that issue when the permit was granted. Mr. Franklin and Ms. Hoffine regularly, nearly a dozen times, spoke about the proposal. Their conversations included discussions of engineering matters since Mr. Franklin is an engineer. From April 12, 1988, when stock was distributed, until July 12, 1990 when Mr. Franklin sold his stock to Mr. Moyer, there was no written prohibition on Mr. Franklin voting his 70 percent interest. Moreover, while he was consulted about the proposal by Ms. Hoffine, when he had questions about costs or the worthiness of the venture, he consulted his business partner, Jim Evans. The record does not support Delta's argument that Ms. Hoffine exercised or would exercise complete control.

189. Quite aside from Mr. Franklin's perception of his own interest, it is apparent that the choices Delta made were greatly, if not totally, determined by Mr. Franklin's business partner, Jim Evans. Mr. Evans is an applicant for a radio station in Montecito, California. Delta's lawyer is the same counsel that represents Mr. Evans in Montecito. They also have the same engineer. Evans gave Hoffine cost estimates and the bank, which issued the financing letter, is one where Franklin does business, not Hoffine. While Hoffine has prosecuted the application, Franklin and Evans provided the knowhow that made it possible.

190. After this case was designated for hearing, Mr. Franklin decided to sell his interest. Ms. Hoffine maintains she found Thomas Moyer to replace Franklin. Mr. Moyer decided on the basis of a single telephone call from Ms. Hoffine to purchase Franklin's stock and finance the prosecution of the application. Tr. 1560. He had never met Ms. Hoffine but a cameraman, who works for Mr. Moyer, who is a movie producer, had spoken about her to him and he knew she had worked in television. Tr. 1560-61. Mr. Moyer had no agreement with Delta about the $250,000 he promised to lend Delta until December 1990, a month before he was deposed. Mr. Moyer claims he invested without any information or discussions with Ms. Hoffine about the business potential of the proposal. He can sell his stock without restriction. Mr. Moyer did not even know what he had paid Mr. Franklin for his stock until he was shown the bill of sale.

191. Delta changed its ownership after the hearing was designated by the Bureau. Until that time, the evidence does not support Delta's claim that Ms. Hoffine exercised or could exercise total control. The changes Delta made after designation of this case for hearing (the corporate consent limiting Class B common stock voting rights, in late August 1990, the sale of Mr. Franklin's stock on July 12, 1990, and the loan agreements with Mr. Moyer in December 1990) appear to have been done to change debilitating facts that resulted from Franklin's relationship with the applicant. These facts and the changes made as the hearing approached make Delta's proposal unreliable. It is not entitled to credit for its integration proposal.

Quantitative Integration

192. Joelmart, Broadcasting, and Benns have credible integration proposals. Joelmart and Benns have received credit for complete integration of ownership and operation by owners. Broadcasting will integrate one owner, who owns 90 percent of the applicant, full time, and one owner, who receives ownership credit for 5 percent ownership, part-time. There is not much difference between Broadcasting Joelmart and Benns' quantitative proposals.

193. Broadcasting's 90 percent owner, John Graziano, does not live in Santa Barbara, although he will move to the community. He had five years of broadcast experience before Broadcasting filed its application and a little over four years after the application was filed. At the time the application was filed, in March 1988, John Graziano was not working in broadcasting but he began again in October 1988. His brother, Paul Graziano, who will work 25 hours per week at the station, has lived in Santa Barbara since 1981. He has participated in some local activities that relate to his business as a lawyer. It appears that, despite the business purpose for his civic activities, they do provide a greater understanding of Santa Barbara.

194. Benns does not live in Santa Barbara but she will move to the community. Ms. Benns has not participated in local civic activities. She is an Asian American woman. Ms. Benns also has broadcast experience. From sometime in 1981 until October 1982, she worked part-time at a station. She also appears to have worked at stations she owned with her spouse during 1982 to 1986 but she has not provided any estimate of the amount of time she worked during those years. Beginning in May 1987, she began working full time, 40 hours per week, at a television station she runs with her spouse. Ms. Benns can be credited with 21 months part-time broadcast experience and 9 months full-time broadcast experience before she filed her application and about four years full-time broadcast experience after she filed her application.

195. Joelmart's equal owners live at Hope Ranch just outside the Santa Barbara city limits but within the proposed primary signal of the station. They have lived there since 1986. From December 1986 to June 1987, they only spent part-time at their home in Hope Ranch and part-time at their Los Angeles home. Mr. Silverman has been active in local civic activities on a continuing basis since

1987. Ms. Silverman has been more active than Mr. Silverman for the same length of time. Ms. Silverman, who owns half of Joelmart, is entitled to female credit.

196. Qualitatively, Benns and Joelmart are to be preferred over Broadcasting. Joelmart's principals' residence within the primary service area and their routine participation in local civic activities is entitled to slightly greater weight than Benns preference for being an Asian American. Ordinarily, a minority preference would equal local residence but, when it is combined with extensive civic activities, Joelmart is to be slightly preferred. Broadcasting receives credit for local residence and some civic activities by Paul Graziano, a 5 percent owner, who will work only 25 hours per week. The weight to be attributed to those factors is greatly diminished because he has a small ownership interest and he only will be a part-time station worker. Joelmart is very slightly preferred for its local ownership over Benns' minority control. Benns, however, has broadcast experience and is controlled by a female. Joelmart's principals have no broadcast experience but half of its ownership is female. Benns' broadcast experience is only entitled to a slight preference but her female ownership is better than Joelmart's half female ownership because Benns owns 100 percent of the applicant. Broadcasting's 90 percent principal has broadcast experience but it does not outweigh Benns minority and female ownership and broadcast experience or Joelmart's local ownership, civic activities and female ownership. Benns, because of her greater strength over Joelmart in broadcast experience and greater female ownership is preferred over Joelmart.

Comparative Coverage and Auxiliary Power

197. None of the qualified applicants is entitled to a preference for overall population coverage, because the differences are not significant. None of the applicants is entitled to a preference for service to underserved white or gray areas. The qualified applicants are equal on the comparative coverage criterion. All the qualified applicants propose auxiliary power.

Diversification of Ownership of the Mass Media

198. Isis, Joelmart, Broadcasting, P & T, and Delta are to be preferred over Benns and Wodlinger because they do not have any media interests. Benns and her spouse own WFLI, Inc., which operates an AM station at Lookout Mountain, Tennessee, and a television station at Cleveland, Tennessee. Ms. Benns is the licensee of a lower power television station that extends the signal of the Cleveland television station to Chattanoga, Tennessee. Mr. Benns has a 5 percent interest and is the general partner of an FM station in Braddock, Pennsylvania. While WFLI, Inc. stations are over 2,000 miles from Santa Barbara. They are the only local outlets in their communities, although other service is available from outside the community. Ms. Benns controls the Tennessee stations and she intends to continue overseeing the stations from Santa Barbara.

199. While Constance Wodlinger has represented that she will divest her interests in Monett Communications, her spouse who owns half of the company did not make a timely divestiture pledge. Monett owns two stations in Monett, Missouri. In addition, Mr. Wodlinger is trustee for a 25 percent interest in a station in Naples Park, Florida, which he did not promise to divest. Mr. Wodlinger intends to actively help manage the Santa Barbara facility. As between Benns and Wodlinger, Wodlinger is to be preferred because the Wodlingers will own only a half interest in two radio stations in a community some distance from Santa Barbara. The interest in the Naples Park, Florida station is only a minority interest in a station a long distance from Santa Barbara. Benns, on the other hand, controls her interest in the Tennessee television and the AM stations. She will manage the Santa Barbara station and devote part of her time to her Tennessee facilities. While the stations are a long distance from Santa Barbara, they are the only outlets of their kind in their communities. Benns is least preferred on the diversification criterion.

Ultimate Conclusion

200. Benns' control of two broadcast stations in other communities results in a comparative demerit. "Diversification is a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965). Benns' outlets are significant in their communities and she and her spouse own all of each facility. Benns operates the only radio broadcast facility assigned to Lookout Mountain and the only television facility in Cleveland, Tennessee. The impact of the television station on diversity is greater because Benns also operates an LPTV in Chattanooga, Tennessee which extends the signal of the Cleveland station. Neither facility is close to Santa Barbara. While the record does not reflect how many stations Santa Barbara has, it currently has extensive service. The *Broadcasting Yearbook* lists over 10 radio broadcast stations currently operating in Santa Barbara. Joelmart, the other applicant that will fully integrate its owners into the day-to-day operation, has no interest in the mass media. Joelmart is favored because it has no diversity demerit. Benns is slightly stronger in its integration proposal than Joelmart because of the qualitative attributes of its participating owner but her slightly greater qualitative strength does not outweigh Benns' demerit for her mass media interests because of the primary importance the Commission attaches to that factor. Joelmart is to be preferred overall and a grant of its proposal will serve the public interest.

ACCORDINGLY, IT IS ORDERED that the applications of Isis Broadcast Group (File No. BPH-880301MG), Graziano Broadcasting Company (File No. BPH-880301NA), Patricia Wheeler Wodlinger (File No. BPH-880301ND), Chanel Broadcasting (File No. BPH-880301NH), P & T Communications (File No. BPH-880301NO), Santa Barbara Communications, Inc. (File No. BPH-880301NR), Deborah Lynn Sczudlo (File No. BPH-880301OA), Ying Hua Benns (File No. BPH-880301OE), and Delta Broadcasting, Inc. (File No. BPH-880301OL) ARE DENIED and the application of Joelmart, Inc. (File No. BPH-880301MJ) for a construction permit for a new commercial FM station on Channel 299 B1 in Santa Barbara IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] The transcript for August 6, 1991 has been incorrectly dated August 4, 1991 by the reporting company; it should be corrected to reflect the correct day.

[2] Joelmart Exhibits 21-26 were produced in this proceeding by the bank pursuant to a Subpoena Duces Tecum. Ms. Sczudlo did not produce these documents because she claimed to have misplaced them when she was sick with a high fever. Tr. 1694-95. Before these documents were produced by the bank, Ms. Sczudlo testified at her deposition on the financial issues that there were no other documents relating to the bank letter. Tr. 1711-12. Mr. Morreale could not recall Sczudlo telling him that she was ill during this time. Tr. 1741.

[3] This property is owned in partnership with another individual who acts as managing partner.

[4] The figures for Isis, Wodlinger, and Benns are based on their original proposals. These applicants may not derive a comparative advantage from the greater overall coverage provided in amendments to their applications. The figures for Chanel, P&T, Sczudlo, and Delta are based on amendments to their applications. These applicants may not derive a comparative advantage from the greater overall coverage provided in their original proposals. The figures for the remaining applicants are based on their original, unamended proposals.

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
SPIRIT BROADCASTING	File No. BPH-851231MZ
JAMES EVANS	File No. BPH-851231MR

For Construction Permit for
New FM Broadcast Station at
Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1992; Released: January 23, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 5714 (1989) (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ) in the above-captioned proceeding.[1] It also has before it the exceptions and replies of (1) Shawn Phalen (or Phalen), (2) Ellwood Beach Broadcasting, Ltd. (Ellwood Beach), (3) Spirit Broadcasting (Spirit), and James Evans (Evans).[2]

2. Originally a seven-party comparative case, we last encountered this proceeding to focus on the *I.D*'s award of this frequency to one Claudia Bratton. Upon the exceptions and oral argument, we were compelled to agree with the exceptors that the case required remand on financial issues against that tentative winner. *See Memorandum Opinion and Order*, 5 FCC Rcd 53 (Rev. Bd. 1989). The case was then extensively delayed by an erroneous *Supplmental Summary Decision*, FCC 90-D, 14, released by the ALJ on April 4, 1990, and a barrage of interlocutory pleadings by Bratton that were not finally resolved until the Commission's action in *Shawn Phalen*, 6 FCC Rcd 990 (1991), after which Bratton dismissed her application and the ALJ issued a *Supplemental Initial Decision* on May 20, 1991. *See supra* note 1. However, after reviewing the *I.D.* and the pleadings, the Board regrets that it cannot make an award on the existing record, but must remand this case for further hearings on the new issues specified below.[3]

SHAWN PHALEN

3. *Real-Party-In-Interest.*[4] As the *I.D.* recounts, Shawn Phalen was a 19-year-old freshman at the University of Arizona when this application was filed in her name. *I.D.*, para. 14. She was inspired to file this application, she claims, on the basis of a "cold call" to the campus from the communications counsel, David Tillotson, who has for many years represented her father Richard (Rick) Phalen, a man with extensive broadcast experience[5] and currently the controlling principal of licensee of KQKS-FM, Longmont, Colorado. *Id.*, para. 6. The ALJ records (*id.*, para. 14):

> Rick Phalen claims that Tillotson did not call him before he (Tillotson) called Shawn, but he couldn't explain how Tillotson obtained Shawn's phone number. At her deposition, Shawn Phalen couldn't remember whether she and her father discussed the fact that Tillotson would be calling her before the fact. But she assumes that Tillotson spoke with her father before calling her. In the initial call, Tillotson, told Shawn that her female status and local residence would be important advantages if she applied for the channel. *See* Tr. 332-333, 497 and 499; FM Montecito Ex. 22, pp. 31-34, 41; and FM Montecito Ex. 23, pp. 10 and 12.

4. Though Shawn Phalen claimed that Tillotson first called *her* about the application, counsel's billing records show that the first call went to Rick Phalen, with whom counsel discussed (among other things) a transmitter site. *I.D.*, para. 21. A second call included Rick Phalen's engineer, Benjamin Dawson. *Id.* Rick Phalen also contacted his Chicago attorneys to prepare a site lease, and the billing record of those attorneys reflects that their client was Rick Phalen. *I.D.*, para. 22.

5. While Shawn Phalen testified that the mailing of bills by communications counsel to her parents was a "mistake," there is no argument that her parents are financing this entire venture; that her parents keep the applicant's checkbook; that her mother had signed Shawn's name to checks when Shawn was away; that Rick Phalen has paid bills for the applicant on his own without any consulation with the applicant; that Shawn has no obligation to repay the "loans" (except if the station makes a profit); or that her parents had spent $65 thousand at the time of the hearing (including, *e.g.*, Shawn's air fare to this hearing). *I.D.*, paras. 23-27.

6. Moreover, the ALJ writes that Rick Phalen has been deeply involved in many aspects of his daughter's application after the hearing was designated. Not only did he receive all copies of correspondence between counsel and his daughter, and spoke to counsel often about the case, *id.*, para. 28, Rick Phalen took a very active (if not dominant) role in later settlement negotiations. *Id.*, paras. 36-38.

7. In the end, the ALJ concluded (*id.*, Concls. at para. 5; footnote omitted):

> Her father, Rick Phalen, is unquestionably a real-party-in-interest in Shawn's application. More than that. The record evidence points to the conclusion that BPH-851231MO is actually Rick Phalen's application, not Shawn's. This is a classic example of a white non-Hispanic, male applicant using his

daughter as a "front" in order to obtain a comparative female enhancement and avoid a comparative diversification demerit.

8. *Exceptions*. The initial attack on the *I.D.* under this issue is directed toward the ALJ's comment that he considers the maturity and business background of the applicant in assaying license qualifications.[6] Invoking the 1965 *Policy Statement*, 1 FCC 2d 393 (1965), Phalen contends that such factors are irrelevant, but jaundiced the ALJ's view on this issue.[7] Next, citing the Federal Rules of Evidence, Section 408, Phalen contends that it was error to consider settlement negotiations and that "[i]t is obvious from both the transcript . . . and the *Initial Decision* that the ALJ was disturbed and angry that the settlement . . . had collasped."[8] Phalen submits that, once the ALJ's findings on the settlement negotiations are properly stricken, the "remaining findings under the party-in-interest rule are clearly insufficient to support a conclusion that Rick Phalen is a party-in-interest in Phalen's application."[9]

9. Notwithstanding the contention that, shorn of the settlement matter, the *I.D.* must fall, Phalen marshals numerous other arguments on this issue. She asserts that, though Rick Phalen did discuss the application with counsel and the engineer, these calls were surprisingly infrequent and "dealt with matters that Rick Phalen had a legitimate interest in as the person providing financial backing for Phalen's application (*e.g.*, the effect of the Court ruling on female preferences on Phalen's comparative position) . . . ."[10] And she claims that Rick "Phalen never told her communications counsel to send [him] copies of letters that he sent to [Shawn]," that "*at least* one substantive pre-designation letter . . . *was not* sent to Rick Phalen," and that in any event[11]:

> [t]he fact that Rick Phalen was sent carbon copies of the letters referred to in [para.] 32 of the ALJ's findings is not probative of whether Rick Phalen is a party-in-interest in Phalen's application since *all* of the letters referred to in this finding pertained, in whole or in part, to the added issues which directly involved Rick Phalen.

10. As to the provision of finances, and relying heavily on cases such as *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984), *recon. denied*, 57 RR 2d 1483 (1985), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986); *KTRB Broadcasting Co.*, 46 FCC 2d 605 (1974), Phalen contends that the intrafamilial provision of financing is neither unusual nor controlling. She argues that in both cases the fact that parents provided the financing did not make out a real-party-in-interest case, and that in *KTRB* the Commission found that the fact that "although one of the sons was § 21 years old, unmarried, [and] a full-time student'" did not negate the claim there that the son would "be 'his own man.'"[12] Phalen claims that the facts in *KTRB* were "virtually identical" to her case,[13] and yet the father there was not found to be a real party.

11. Finally, Phalen pleads that "assuming, *arguendo*, that the evidence of record were deemed sufficient to support a conclusion that Rick Phalen is a party-in-interest," she should not be disqualified because "[t]here is not a scintilla of evidence in the record which even suggests that Phalen, or her father, concealed or attempted to conceal from the Commission any aspect of their relationship, understandings or conduct concerning Phelan's application from the Commission."[14] Interposing *Tequesta Television, Inc.*, 2 FCC Rcd 7324 (Rev. Bd. 1987) and *Virginia Beach Television Ltd.*, FCC 84D-87, released December 24, 1984, Phalen maintains that she may not be disqualified under this issue in the absence of a record evincing an intent to deceive, and she represents[15]:

> After considering the findings and conclusions of the ALJ in the *Virginia Beach Television Ltd.* case pertaining to Bishop Willis' party-in-interest status in his daughter's application, the Commission held that "no adverse character considerations flow from this real party in interest finding." The Commission based this holding on the fact that the real party in interest holding did not derive from any findings of active wrongdoing on the part of Bishop Willis, in the sense of conduct, understandings or a relationship that was concealed from the Commission, but rather from a conclusion that an inevitable *future* course of conduct would result from his daughter's past total dependence upon him and the desire to protect an investment completely financed by him.

12. *Discussion*. "The Commission's real-party-in-interest inquiry typically focuses on whether a third person 'has an ownership interest, or will be in a position to actually or potentially control the operation of the station.'" *Astroline Communications, Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988)(quoting *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974)). Before applying that standard to the facts of this case, we will treat Phalen's two preliminary grievances. Initially, we concur with Phalen that the ALJ's *en passant* views on an applicant's maturity and lack of business experience are largely gratuitous. However, we note that (1) Phalen never sought the ALJ's removal under 47 CFR § 1.245; (2) the formal conclusions of the *I.D.* are derived of the ALJ's inferences from a plentitude of specific factual findings and are not based simply on a vague uneasiness with Shawn's tender years; and (3) in considering whether an applicant has maintained, or will maintain, control over a station, the Commission itself has considered probative, though certainly not dispositive, the relative broadcast experiences of the putative applicant and the dominant financier. *See, e.g., Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5606 n.20 (1991); *accord, Evansville Skywave, Inc.*, 6 FCC Rcd 5373, 5375 (Rev. Bd. 1991)(and cases cited therein). As to the ALJ's discussion of the settlement negotiations, and while we agree that the law is generally disinterested in the specific terms and conditions of such negotiations, *see RKO General, Inc.*, 2 FCC Rcd 1626, 1627 (1987), it is not altogether irrelevant that a nominally "passive" financier took a very active role in settlement negotiations. *See, e.g., Evansville Skywave*, 6 FCC Rcd at 5377 n.10.

13. But on the subject of finances, and moving to the core substantive question of whether the record proves that Rick Phalen is a real-party-in-interest, we find ourselves partly in accord and partly in disaccord with Phalen's exposition of the law. True, particularly in a family situation, the law is clear that the mere provision of finances summons no grounds for inordinate suspicion, and Phalen's citation to *High Sierra* for this proposition is just on point. *See also Rayne Broadcasting Co., Inc.*, 5

FCC Rcd 3350 (Rev. Bd. 1990)(and cases cited therein). Indeed, even absent a family relationship, a mere "creditor" is not deemed ordinarily to possess control. *Morris, Pierce & Pierce,* 88 FCC 2d 713, 717 (Rev. Bd. 1981), *review denied,* FCC 83-31, released January 25, 1983. *See generally also KIST Corp.,*102 FCC 2d 288, 290-93 (1985).

14. At the same time, a financier can use that leverage as a bludgeon with which bend a licensee to its will, as the Commission continues to recognize. *See Benito B. Rish, M.D.,* 6 FCC Rcd 2628 (1991) *(inter alia,* "finances can demonstrate that control has been relinquished to another unauthorized person"). So did the court, over 50 years ago, in *Heitmeyer v. FCC,* 95 F.2d 91, 99 (D.C. Cir. 1937), when it held:

> It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances . . .
>
> [T]he burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect . . . .

See also WLOX Broadcasting Co. v. FCC, 260 F.2d 712, 715-16 (D.C. Cir. 1958)(financial leverage can effect control).[16]

15. In the case before us, Rick Phalen seems quite willing to wield that bludgeon on his daughter, for as the I.D. (at paras. 39-40) reflects:

> Rick Phalen is pointedly aware of the total control he has exercised over his daughter's application, and why he has that control. At the June 27, 1989, hearing session, the following colloquy occurred. (Tr. 384, lines 3-8):
>
> "JUDGE MILLER: So you have actively participated in --
>
> "THE WITNESS: As my daughter's financial advisor; in terms of how much money we are willing to settle for, yes sir. Without me -- I'm the bank. You know, she's got a problem."
>
> Moreover, Rick Phalen intends to continue to exercise control even after the station goes on the air. He testified (FM Montecito Ex. 23, pp. 20-26) that he " . . . would be watching it, and . . . would want to see monthly profit and loss statements and see how the operation is going." And he told his daughter: "you know, if the thing goes belly up -- we could have a loan agreement that says you have to meet certain levels, and if you don't the phones would be cut off . . . I can't tell you to sell the radio station; it's your radio station. But if push came to shove, I could cut off the funds."

16. Summing up the evidence thus far, the record supports the I.D. that (1) Rick Phalen was instrumental in the filing of this application; (2) he took an active role in the engineering and legal aspects, as well as in settlement negotiations; while (3) Shawn, who claims she retained counsel, did not know her attorney's fee rates (I.D., para. 20), did not discuss costs with "her" engineer (id., para. 21), nor did she estimate the "specific cost estimate for her transmitter, antenna, transmission line, and studio equipment." Id., at para. 49. When conjoined with her father's financial dominance, the picture clarifies.

17. Moreover, it is clear that the Phelans were preoccupied with the Commission's gender preference. *See id.,* paras. 14, 41; Phalen Exceptions at 24-25 n.17. [17] In a variety of settings, the Commission has experienced many times in recent years the banal device of a white male, disadvantaged from a comparative perspective, lurking behind the petticoat, *see, e.g., Royce Int'l Broadcasting,* 5 FCC Rcd 7063 (1990), *recon. denied,* 6 FCC Rcd 2601 (1991); *Progressive Communications, Inc.,* 5 FCC Rcd 7058 (1990) *recon. dismissed,* 6 FCC Rcd 1383 (1991). *Richard P. Bott II,* 4 FCC Rcd 4924, 4928-30 (Rev. Bd. 1989) *review denied,* 5 FCC Rcd 2508 (1990), *aff'd by judgment sub nom. Radio Representatives, Inc. v. FCC,* No. 90-1227 (D.C. Cir. 1991). *Metroplex Communications, Inc.,* 5 FCC Rcd 5610 (1990), *aff'd by judgment sub nom. Southeast Florida Limited Partnership v. FCC,* No. 90-1482 (D.C. Cir. October 28, 1991); *N. E. O. Broadcasting Co.,* 103 FCC 2d 1031 (Rev. Bd. 1986); *review denied,* 1 FCC Rcd 380 (1990). While financial support alone is not dispositive, perforce in a family setting, the case law is long, loud and clear that we will scrutinize even family relationships to assure the "independence" of the applicant from nonparties. *Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 654-656 (Rev. Bd. 1983)(subsequent history omitted). [18] Upon the facts at bar, Shawn Phalen has been, and was intended as no more, than a fantocine in her sire's guignol. He is either *a,* or *the,* real party in this Monticeto application, beyond peradventure.

18. Undoubtedly sensing that the curtain is forever drawn on the real party facet, Phalen argues in the alternative that even if Rick Phalen is so deemed, no disqualification should ensue because the Phalens were candid throughout and certainly engaged in no outright misrepresentation. It is here that Phalen raises an interesting point. While we do not accept its reliance on *Tequesta Television, supra,* where we merely observed that, prior to disqualification, (either) a real party (or a misrepresentation) issue ought be added, *see* 2 Rcd at 7325,[19] and the real party issue was here fully tried, the law beyond that is superficially clouded. In *Astroline, supra,* the court remarked that the Board had "on occasion *suggested* that an applicant who was not the real-party-in-interest would be disqualified from comparative licensing competitions." 857 F.2d at 1564 (emphasis added)(citing *KOWL, Inc., supra; Creek County Broadcasting Co.,* 31 FCC 2d 462, 467-68 (Rev. Bd. 1971)). When last faced with this precise question in *Ocean Pines LPB Broadcast Corp.,* 5 FCC Rcd 5821, 5822 (Rev. Bd. 1990), the "majority" decision avoided a resolution, but two members of the panel issued separate statements espousing their view that real party issues are disqualifying, because the element of deceit is implicit in an adverse determination. *Id.,* at 5826, 5827. *See also Tequesta Television, supra.*

19. We continue to hold to that reckoning. Our primary ground is simple deduction: in our cases, there are but two species of issues, *comparative* and *basic qualifying.* As nobody could suggest that real party issues are measured relatively under the 1965 *Policy Statement,* the issue must necessarily fall into the latter category, a point we

thought we had highlighted in *Tequesta Television*. *See also Massilon Broadcasting Co., Inc.*, 44 FCC 2540 (1961); *Barbara Kay Peel*, 6 FCC Rcd 2833, 2835 (1991)(*HDO*) (real-party-in-interest issue triggers basic character inquiry). Inasmuch as that is our conviction, [20] and as we uphold the ALJ's conclusion that Rick Phalen is inarguably a real-party-in-interest to this application, we find the applicant wholly disqualified. [21]

20. *Other Issues*. Because we find Phalen is solidly disqualified on the real-party-in-interest issue, we need not review her exceptions under the other issues (*see supra* note 4) to determine whether she is further disqualified. For whatever assistance, we do note that although the ALJ found adversely on the Section 1.65 issue (*I.D.*, paras. 5-12)(failure to report father's acquisition of KQKS-FM), the Board long ago held that when the acquisition of a broadcast interest is reported to (and on public file with) the Commission, it is difficult to infer an intent to deceive. *Superior Broadcasting of California*, 94 FCC 2d 904, 909-10 (Rev. Bd. 1983). As to the financial issues, we believe that while Shawn Phalen's parents appear to have had more than ample resources to fund her application, *see I.*D., para. 60 (assets exceed liabilities by $2.9 million), her own sworn certification seems vacuous since she never prepared a budget (*see id.*, para. 56); and even her written loan commitment left her short (*see id.*, paras. 58-59). Her certification seems therefore altogether glib. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989)(subsequent history omitted)("applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs"). Here, Phalen had no idea of (nor concern with) her application prosecution costs, let alone no clear construction or operating budget. Perhaps her father might have properly sworn; but his daughter (consistent with her jackstraw role) affixed her sworn signature to a federal application apparently *sans souci*.

ELLWOOD BEACH BROADCASTING

21. The *I.*D. awarded this applicant only a 20% integration credit, attributing for comparative purposes the 80% equity interest(s) of its two 40% limited partners, Ray Stanfield and E.L. Cartwright. [22] The *I. D* reduced the integration credit chiefly because the limited partnership agreement did not contain the insulation provisions required by the Commission, *id.*, para. 109, and also because (*id.*, at para. 107 (footnote omitted)):

> [t]he Ellwood Beach partnership agreement provides that the partnership can be dissolved at any time by "the affirmative vote of both the General Partners and Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership." Since the limited partners hold an aggregate of 80%, they have the right to dissolve the partnership at any time. This effectively gives them the right to seize control of the partnership assets at any time. At dissolution, the limited partners would have an 80% interest in the assets, including the license, and therefore would control those assets.

The ALJ also found that Ellwood Beach was "a creation of the two limited partners" whom he found held "ultimate control." *Id.*, at para. 111.

22. *Exceptions*. Relying on *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), *vacated as moot*, 6 FCC Rcd 1814 (1991), and *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), [23] Ellwood Beach argues for 100% integration credit. Citing *Independent Masters, Ltd.*, 104 FCC 2d 178, 191 n.25 (Rev. Bd. 1986), [24] it also argues that the Commission's 1985 insulative provision requirements should not be applied to partnership agreements created prior to the effective date of the stricter requirements. [25] It also maintains that its partnership agreement, which provides for dissolution "upon the affirmative vote of both the General Partners and Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership," does not "give the limited partners [80% ownership interest] the unilateral right of dissolution." [26]

23. *Discussion*. Even were we to agree with the exceptions of Ellwood Beach on all of these points, [27] subsequent developments make it impossible to immediately grant its application. In *Carta Corp.*, 5 FCC Rcd 3696, 3705 n.13 (Rev. Bd. 1990), we noted that one of the so-called "limited" partners to a sham had apparently developed the *modus operandi* of employing "false front applicants, and we held that no license should be granted to an applicant that includes that partner without further exploring its basic qualifications, in accordance with *Tequesta Television, supra*. *See also Marlin Broadcastinig of Central Florida*, 4 FCC Rcd 7945, 7957 n.18 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (1990), *review denied*, 5 FCC Rcd 5751 (1990) (*recon. dismissed*, FCC 90-409, released Dec. 12, 1990). Ray Stanfield, a 40% "limited" partner in the instant Ellwood Beach applicant, was also a (28.33%) "limited" partner in the sham *Carta Corp.* applicant, 5 FCC Rcd at 3696, and he was found to have participated in yet another sham application in Salinas, California. *Salinas Broadcasting Limited Partnership*, 4 FCC Rcd 2762, 68-69 (ALJ 1989). [28] The Board's decision in *Carta Corp.* was just affirmed on that point. *See Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991 (but modifying *Carta Corp.* on other grounds). [29]

24. As the Commission recently indicated to the court, when a party has been a participant in an egregious sham, it may become necessary to additionally determine whether any such party possesses the basic qualifications for licenseeship. Brief For Appellee at 15-16 n.6; 44 n.22, *Southeast Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. filed June 11, 1991), a case in which the Commission was just *aff'd perjudgment*, Slip Op. released October 28, 1991. *See also Royce Int'l., supra*, 5 FCC Rcd at 7065 n.6. Accord, *Evansville Skywave, supra*. In two cases, *Carta Corp.* and *Salinas Broadcasting*, Ray Stanfield was an active party to an egregious sham applicant, so an appropriate issue must be tried against Ellwood Beach before we could grant the license. [30] This is particularly true here, since Stanfield must be reckoned an "active" owner in Ellwood Beach (*see supra* note 27). *See generally Barbara Kay Peel, supra* (character issue added to examine conduct in prior comparative proceedings).

SPIRIT BROADCASTING

25. The ALJ denied Spirit all integration credit, finding its limited partnership to be a sham because (1) he found that it had no written limited partnership agreement on the "B" cut-off date (I.D., para. 118), and (2) he found that, even assuming there was such an agreement, "all

[three] partners ignored the limited partnership agreement they finally did execute" on the matter of finances. Id., at para. 124. Nonetheless, the ALJ did not disqualify Spirit, but merely awarded it no comparative integration credit. *Id., Concls.* para. 16.

26. *Exceptions.* Spirit contends that it did have a written partnership agreement on the "B" cut-off date, [31] claiming that a timely amendment to its original agreement merely changed the equity percentages of its "general partner, Michael Durden to 72% (down from 80%) and its two "limited" partners, Martin Moss and Jimmy Turner, to 14% each (up from 10% each). It argues that its partnership is *bona fide* and no sham, merely because of technical failures in complying with certain accounting aspects of the agreement. [32] The exceptions of James Evans, however, maintain that the ALJ erred in failing to disqualify Spirit on finances. [33] Spirit replies that Evans' plaint is improper, since he never sought to enlarge the issues against Spirit. [34]

27. *Discussion.* Even assuming Spirit had an operative limited partnership agreement, [35] we cannot grant its application without trying financial certification and basic financial qualifications issues. As we observed in *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6323 (Rev. Bd. 1990), where this same ALJ also made animadversions to an applicant's finances and then made adverse findings based thereon, but had not added a financial issue, the ALJ here pummeled Spirit, but did not disqualify it based on the record evidence. Because this instant *I.D.* was issued prior to *Mableton*, the ALJ was probably unaware of his error, and thought perhaps he could reach basic finances through a comparative integration analysis. Not so.

28. We staunchly agree with the ALJ and Evans, however, that significant and material questions of fact appear in this record as to whether Spirit had a legitimate basis for certifying as to a "reasonable assurance of finances, and whether it is, in fact, financially qualified. As we commented with respect to Phalen *(see supra* para. 20), it is not clear that Spirit ever prepared a serious budget. [36] Moreover, while the partnership agreement (§5.33) provides that the "limited" partners shall each provide $15 thousand when its "general" partner made a request of each of them for a mere $1,000 to help prosecute the application, they flatly refused. [37] Finally, whereas the "general" partner claims he felt that the "limited partners could meet their respective financial obligations, he really had no empirical basis. [38] Issues must be tried before Spirit could receive the grant.

JAMES EVANS

29. The ALJ declined to award Evans, a sole proprietor, any integration credit because Evans testified that:

> [i]t would be just absolutely wonderful if the station was in the black and was just making all kinds of money and I was able to find people that could work there and I would just go in and be on the air every once in awhile or do what ever I liked to do, that would be a dream come true.

I.D. at para. 126 (quoting Tr. 1089-99).[39] Evans also (*id. at para. 127, citing Tr. 1080):*

> presently owns a number of businesses. They include a site leasing company, and 50% of businesses involved in land mobile radio, paging, and specialized mobile radio (SMR). He spends less than 10 hours per week monitoring the affairs of these various businesses (Evans Ex. 1, p.2). Mr. Evans' typical work day consists of making some telephone calls at home, perhaps taking a tennis class, arriving at the office about 5:00 p.m. looking at messages and his mail, going to the post office and returning home . . . . He currently spends an average of 30 hours looking for new SMR investments.

Evans said he wouldn't devote more than 30 hours per week to these businesses, but did not indicate precisely how much time he *would* devote. *See* Tr. 1115.

30. *Exceptions.* Evans asserts that his quoted language was, in effect, precative, and that his full-time commitment to the station was "unequivocal." [40] Spirit replies that "Evan's [sic] arguments cannot obviate his clear testimony -- and intention -- that he will devote most of his time to other business endeavors (whatever those may be) once his station is up and running . . . ." [41]

31. *Discussion.* We will affirm the I.D. Even if we were to overlook Evans' wishful testimony, *but cf. Victorson Group, Inc.*, 6 FCC Rcd 1697, 1697-99 (Rev. Bd. 1991), we would be compelled to deny integration credit. As we stated in *Naguabo Broadcasting Co.:*

> The Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leinenger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

6 FCC Rcd 912, 924 n.63 (Rev. Bd. 1991), *modified on another grounds*, 6 FCC Rcd 4879 (1991). The ALJ found that Evans had offered no specific and detailed plan to manage his other significant business interests, and neither Evans' exceptions nor his reply brief disputes that critical finding. Without such a specific, detailed and credible plan, integration credit will not be granted. *See generally Fresno FM, supra*, FCC 91-375 at paras. 11-13; *Ronald Sorenson, supra*, at paras. 8-9 & n.4. Under these circumstances, we shall affirm the *I.D.* and deny all integration credit to Evans. *Naguabo Broadcasting.*

CONCLUSION

32. In the end, we have one applicant (Phalen) disqualified, two applicants that must address qualifying issues (Ellwood Beach and Spirit), and one basically qualified applicant (Evans) that would receive no strong comparative advantage, should the former two survive the following issues.

33. As to Ellwood Beach:

(1) To determine whether Ray Stanfield intentionally participated in the submission of sham applications in Salinas and Fresno, California, thereby abusing the Commission's processes, or made misrepresentations or lacked candor in those proceedings, and the effect on the qualifications of Ellwood Beach to be a licensee.

34. As to Spirit Broadcasting:

(2) To determine whether it falsely certified reasonable assurance of finances in its application; and

(3) To determine whether it is financially qualified to be a licensee.

35. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for a further hearing on the issues specified herein, and for the preparation of a Further Supplemental Initial Decision.

FEDERAL COMMUNUICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The ALJ has also issued a *Supplemental Initial Decision*, 6 FCC Rcd 2789 (1989)(*S. I. D.*), against which the four remaining applicants have filed exceptions and replies. The *S. I. D.* is *in haec verba* with the *I. D.*, save that it (1) omits all reference to two subsequently dismissed applicants, Patricia J. Jacobsen and Claudia Bratton; (2) denies all integration credit to Ellwood Beach, *see S. I. D.*, para. 107 (and note 22 *infra)* ; and (3) awards Evans a 100% quantitative integration credit, *see S. I. D.*, para. 126 (and note 39 *infra)*. For our purposes, we will review the *I. D.* and the originally filed exceptions and replies, since these are more complete and since we remanded this case solely on financial issues against now dismissed Claudia Bratton (*see infra* para. 2). To the extent the Board granted a Joint Petition For Extension of Time, filed on June 26, 1991, to extend the date for lodging exceptions to the *S. I. D.*, that grant was improvident since we shall review only the *I. D.* The Ellwood Beach Motion To Dismiss, filed June 25, 1991, and the pleadings responsive thereto are therefore dismissed as moot. Finally, we accept for reporting purposes only, under 47 CFR § 1.65, the several amendment petitions filed herein.

[2] The Board also has before it the Motion to Intervene and a companion Brief Amicus Curiae, filed June 20, 1991, by Amador S. Bustos, an applicant who is challenging the renewal application of KQKS-FM, Longmont, Colorado. Bustos meets none of the criteria for late intervention set forth in 47 CFR § 1.223, *see also infra* note 20, and the Bustos motion is denied.

[3] The Board sincerely regrets the need for this additional remand, but did not reasonably foresee at our last review of the *I. D.* (1) that none of the (former) six applicants would emerge a comparative winner, or (2) that subsequent case law would change the complexion of this case. Although the Board Chairman did not fully concur in some past Board decisions, *see Carta Corporation*, 5 FCC Rcd 3696, 3705 n.16 (Rev. Bd. 1990), he now agrees that subsequent Commission actions require the addition of a basic qualification issue. The Board has not previously had the unfortunate experience of surveying a case in this posture.

[4] The ALJ also added, and resolved adversely against Phalen, the following issues:

> II-1: To determine whether Shawn Phalen has violated 47 CFR 1.65 by failing to amend her application to reflect that her father, Rick Phalen, had acquired a radio station, and if so, what effect that violation has on Phalen's basic qualifications to be a Commission licensee.
>
> II-2: To determine whether Shawn Phalen deliberately concealed from or lacked candor with the Commission by failing to report her father's media interest, and if so, what effect that concealment or lack of candor, has on her basic qualifications to be a Commission licensee.
>
> * * *
>
> II-4: To determine whether Shawn Phalen misrepresented or lacked candor when she affirmatively certified her financial qualifications in BPH-851231MO, and if so, what effect those misrepresentations and/or lack-of- candor has on her basic qualifications to be a Commission licensee.
>
> II-5: To determine whether Shawn Phalen is financially qualified to construct and operate it for three months without revenue.

[5] The *I.*D. (at paras. 17-19) reports:

> On the other hand, Rick Phalen was and is a broadcaster. He began his career with the radio sales representative firm of Grant Webb in Chicago; then he moved to the John Pearson Company; and then he joined the Mutual Broadcasting System. FM Montecito ex. 23, p.6.
>
> In 1969, Mr. Phalen left the "sales-rep" business to become part-owner of station KIKI, Honolulu, and the following year, he and three people founded Western Cities Broadcasting, Inc. (Western). He was President of Western, and came to own 21.3% of the company. Between 1970 and 1985, Western acquired 8 AM and FM stations in the following markets: Las Vegas, Nevada; Tucson, Arizona; Phoenix, Arizona; Sacramento, California; and Gilroy/San Jose, California.
>
> On March 15, 1985 (less than a month before Tillotson placed his initial call to Shawn Phalen) Rick Phalen and his Western group consummated the sale of their eight station communications network, and he began look around for other broadcast opportunities. Tr. 366-374; and FM Montecito Ex. 23, pp. 6-9.

Rick Phalen found such an opportunity in Longmont, Colorado. *Id.*, para. 6.

[6] During the admissions session, the ALJ had opined (Tr. 239):

> And I look at the facts and I say to myself somewhere along the line, is this person capable of running a broadcast station? She or he? Do they have the necessary business background to make the transition and run a radio station?

> Now, some of the judges don't do that, but I do. I take into account a person's business background. I think the people that don't are sticking their heads in the sand. Now Barbara Marmet did not have that much experience up in Middletown, Maryland. But I looked over her background. She participated in things, she was active in civic activities. She actually went out and did work, volunteer work, and held some jobs down. I said, hey, this is a mature woman who can run a radio station.

[7] Phalen Exceptions at 12-14.

[8] *Id.*, at 21-22.

[9] *Id.*, at 24.

[10] *Id.*, at 25-26 n.17.

[11] *Id.*, at 26 n. 18 (original emphasis).

[12] *Id.*, at 31.

[13] *Id.*

[14] *Id.*, at 32.

[15] *Id.*, at 34 (original emphasis).

[16] We recognize that, in *Doylan Forney*, 5 FCC Rcd 5423, 5427 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. October 7, 1991), the Commission stated:

> There is no mention of any question about control of the applicant in the cited opinion in *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937). In *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), the court predicated the pertinent holding on extensive evidence of *de facto* control by someone other than the putative controlling principal. In *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958), the court decided that a lender was a principal for purposes of integration analysis because the terms of the credit arrangement empowered him to manage the applicant's business and virtually ensured that he would acquire a majority of the shares of voting stock within two years.

However, to the extent that Phalen's exceptions imply that the Commission has completely taken leave of its senses and now makes absolutely *no* connection between finances and control, *see also, e.g.*, Tillotson, *FCC's Comparative Process As A Sham And A Shamble*, *BROADCASTING*, October 5, 1987 at 22, we believe she has overstated her case. *See Benito Rish, M.D., infra.*

[17] In asserting here that, as the financier of "his daughter's" application, Rick Phalen had a legitimate interest in the critical engineering and, for instance, the female preference, Phalen proves far too much, for by that broad standard Rick Phalen could be involved in any and every aspect of the application and station operation, and he himself has insisted as much. *See infra* para. 15. The facts here distinguish this case glaringly from, *e.g.*, *KTRB Broadcasting, supra*, in which Phalen also invests heavily.

[18] The *Cannon's Point* case led to a direct challenge to the Commission's female preference. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated en banc, Order* of Oct. 9, 1986. The preference is again under attack in the D.C. Circuit, *Lamprecht v. FCC*, No. 88-1395, but it turns out that the preference is of far less weight than the Board had loosely assumed, *see Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991 paras. 9-10 (female preference of very slight comparative significance)(by implication), though it had long wondered. *See Horne Industries, Inc.*, 94 FCC 2d 815, 822-825 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601 (1984).

[19] Whereas Shawn Phalen was a freshman when filing, we find sophomoric her postulate that she must prevail on this issue because the ALJ used the term "undisclosed" party-in-interest, though her father's role was always "disclosed." Phalen Exceptions at 20-21. One, the question is who is the *real-party-in-interest, see Astroline* ; and, two, Rick Phalen was not "disclosed" as a "party," the very issue on the table. Apart from that, we do not greatly disagree that a general candor, nay a clumsy transparency, suffused Rick Phalen's *actual* role. While the daughter appears to have engaged in some futile puffery in an attempt to solidify her position (*e.g.*, sending law firm bills to her parents was a "mistake," *I. D.*, para. 23; her claim that she negotiated the engineer's contract, but didn't discuss his fees, *id.*, para. 21), a limited amount of which hyperbole the Commission has always tolerated, *see Grenco, Inc.*, 39 FCC 2d 732, 737 (1973); *John C. Roach*, 43 FCC 2d 685, 689 (Rev. Bd. 1973), we find that the Commission has permitted even much more serious misrepresentations without finding grounds for total disqualification. *See Broadcast Associates of Colorado*, 104 FCC 2d 16 (1986).

[20] We do not here address the question of the impact of this conclusion on the ongoing comparative renewal proceeding involving Rick Phalen's KQKS-FM, Longmont, Colorado, though we have recognized the potential impact of this case. *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 2325, 2326 n.3 (Rev. Bd. 1991); *see also Barbara Kay Peel, supra*. We will address the matter there, if and when the question reaches us in that proceeding.

[21] We do not attempt to distinguish an (apparently) unreported letter to an attorney, relied upon greatly, *see* Phalen Exceptions at 32-34, in which the Commission purportedly found that the adverse real-party-in-interest conclusion of an initial decision in *Virginia Beach Television* (father/daughter applicant disqualified) had no impact on the character of that applicant. Even if Phalen had appended the letter so that we might have surveyed its characteristics, it is salient that Phalen does not say that the letter criticized the ALJ's absolute *disqualification* of the subject *Virginia Beach* applicant in that comparative proceeding. *Compare also Barbara Kay Peel, supra.*

[22] In his *S.I.D.*, and relying on *Royce Int'l Broadcasting, supra*, the ALJ modified his *I.D.* and awarded Elwood Beach no integration credit whatever. 6 FCC Rcd at 2797. For the reasons explained in the text, we need not decide at this juncture whether the reduction was justified on that particular ground.

[23] Ellwood Beach Exceptions at 7. *Susan S. Mulkey* was vacated. 6 FCC Rcd 1814 (1991). We recognize that certain subsequent opinions continue to distinguish *Mulkey, see, e.g., Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498 (1991); *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5606 n.22 (1991), but the Board will not rely on a vacated opinion. *Victory Media*, while not vacated, has been substantially disavowed. *See Poughkeepsie*, 6 FCC Rcd at 2498 n.2; *Royce Int'l Broadcasting, supra*, 5 FCC Rcd at 7065 n.13; *Coast TV*, 5 FCC Rcd 2751, 2752 (1990). It is now known in the trade as "Phyrric *Victory*."

[24] In its recent *Evergreen Broadcasting, supra*, the Commission limited the Board's non-retroactivity approach in *Independent Masters*. *See* 6 FCC Rcd at 5600, 5606 n.11.

[25] Ellwood Beach Exceptions at 4-5.

[26] *Id.*, at 4.

[27] We do not. Purely in light of its contract language, which plainly gives the "limited" partners the equity power to dissolve the partnership, the 80% equity share of the "limited" partners must (at a minimum) be attributed for integration purposes. *Evergreen Broadcasting, supra*, 6 FCC Rcd at 5600.

[28] *Salinas Broadcasting* was not appealed and is thus binding on those parties. 5 U.S.C. § 557(b). While that decision may not be "binding precedent," thereby allowing for the doctrine of *res*

adjudicata, see WFPG Inc., 24 RR 419, 425 (1963), the issue we have here added shall permit full exploration of Stanfield's role in Salinas and in Fresno.

[29] The Commission's affirmation of the need to test the basic qualifications of the *Carta Corp.* principals involved in that wicked sham could hardly have been more clear, since Stanfield's applicant had specifically complained about this very point to the Commission, *see Fresno FM Limited Partnership*, 5 FCC Rcd 7261 (1990), and it is impossible that the Commission simply overlooked this matter. Indeed, pursuant to the Board's footnote language in *Carta Corp*, the ALJ presiding over a Carmel, California proceeding did add a qualifying issue against a *Carta Corp.* principal, *see Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991), but the Commission there again declined to intervene. An epilogue: when the *Carta Corp.* "limited" partner categorically refused to even appear in the Carmel proceeding, the ALJ dismissed the applicant for failure to prosecute. *See Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 4633 (Rev. Bd. 1991).

[30] We recognize that, citing *Carta Corp.* and *Salinas Broadcasting*, the ALJ's *S.I.D.* denied all integration credit to Ellwood Beach; but unlike *Evansville Skywave*, no disqualifying issues were tried to examine Stanfield's intent in those two previous California proceedings. A separate issue must be tried prior to a basic disqualification. *Tequesta Television, supra.*

[31] Spirit Exceptions at 4 & n.2.

[32] *See id.*, at 5-9.

[33] Evans Exceptions at 19-20.

[34] Spirit Reply at 3. n.2.

[35] It appears that any failure to have a written limited partnership agreement at the "B" cut-off date may be here immaterial. *See, e.g., Evergreen Broadcasting, supra*, 6 FCC Rcd at 5599.

[36] When its "general" partner, Durden, was queried at hearing, he testified:

> Q. Thank you. Did you ever ascertain how much money it would take to construct and operate a radio station for three months without revenues?
>
> A. I cannot remember.

Tr. 866. He also conceded (Tr. 901):

> Q. Did you give any consideration to the non-personnel operating expenses of the station?
>
> A. I don't remember.

As to his salary as station General Manager, Durden confessed (Tr. 869):

> Q. Are you going to get a salary?
>
> A. Yes.
>
> Q. Who determined that you'd get a salary?
>
> A. I did.
>
> Q. And when did you determine that?
>
> A. I don't recall what certain date I determined that.
>
> Q. Was it prior to the time you filed the application?
>
> A. I believe so. I think Jimmy and I spoke about it. I mean Jimmy, Martin, and I spoke about it.
>
> Q. And you arrived at a sum?
>
> A. No.
>
> Q. So you don't know what salary you will be getting.
>
> A. No.
>
> Q. And what will determine what your salary will be?
>
> A. I don't know.

[37] Durden testified (Tr. 859-60):

> Q. When is the last time you asked the limited partners for money?
>
> A. I would say a month ago.
>
> Q. And how much did you ask each of them for?
>
> A. $1000.
>
> Q. And have they paid you each $1000?
>
> A. No.
>
> Q. Have each paid you $1000?
>
> A. No.

[38] Durden testified (Tr. 903-04):

> Q. You have personal knowledge of their financial obligations?
>
> A. Oh, no. No.
>
> Q. Do you know the assets and liabilities of each limited partner?
>
> A. No, I don't.
>
> Q. Did you know the salaries of Messrs. Turner and Moss at the time you executed the application?
>
> A. Not exactly, no.

[39] In his *S.I.D.*, and citing the recent *Ronald Sorenson*, 6 FCC Rcd 1952 (1991) *(recon. denied*, FCC 91-371, released November 21, 1991), the ALJ *sua sponte* raised Evans' integration credit from zero % to 100%, stating that since "the Commission has indicated that they are not overly concerned" with applicants who view their broadcast operation as merely one of several businesses they are engaged in . . . neither will the ALJ be overly concerned. 6 FCC Rcd at 2798. We believe that the ALJ

has overreacted to *Sorenson, but see Kevin Potter,* FCC 91R-113, released December 13, 1991 (concurring statement) (integration proposals treated unevenly), and we are confident that the Commission remains deeply concerned. *Naguabo Broadcasting Co.,* 6 FCC Rcd 4879, 4880 (1991).

[40] Evans Exceptions at 15.

[41] Spirit Reply at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Outlet Communications, Inc.
and
Atlin Communications, Inc.
Former Licensee of Television Station
WXIN, Indianapolis, Indiana

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1991; Released: January 22, 1992

By the Commission:

1. The Commission has under consideration (1) a $10,000 Notice of Apparent Liability (NAL) issued by the Mass Media Bureau on April 25, 1990 (5 FCC Rcd 2835), to Outlet Communications, Inc. (Outlet) as the parent corporation of Atlin Communications, Inc. (Atlin),[1] the former licensee of WXIN(TV), Indianapolis, and (2) Atlin's response to the NAL dated May 17, 1990, and its further response dated May 24, 1991. For the reasons set forth below, we conclude that the station has furnished no basis for reducing or rescinding the forfeiture.

2. The forfeiture was assessed for apparent violations of Section 315(b) of the Communications Act of 1934, as amended [47 U.S.C. Section 315(b)], and Section 73.1940(b) of the Commission's rules [47 C.F.R. Sections 73.1940(b)],[2] in that the licensee overcharged legally qualified candidates for public office for their "uses" of the licensee's broadcast facilities within forty-five days of the primary election and sixty days of the general election. The Bureau cited twelve violations of the "lowest unit charge" provision for overcharges to candidates which occurred from April 25 through November 6, 1988. 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940(b). The NAL was also issued for two apparent violations of Section 73.1940(c) of the Commission's rules [47 C.F.R. Section 73.1940(c)][3] because WXIN discriminated between candidates for the same office in rates charged for the same class, length and period of time on August 29 and September 2, 1988 (before the 60-day pre-election lowest unit charge period). The facts surrounding these 14 apparent overcharges are set forth in the NAL and need not be repeated in detail here.[4]

3. In addition to the foregoing, the NAL was issued because of the licensee's use of its fourth quarter political rate card, which was in effect from October 3 through November 8, 1988. The licensee's adherence to that rate card, in the Bureau's view, constituted an apparent violation of the "lowest unit charge" provision because WXIN failed to make available to candidates all discount privileges which it offered to commercial advertisers, specifically the right to purchase all levels of immediately preemptible time.

4. In its response to the NAL, Atlin admits the twelve apparent overcharges to candidates in violation of the lowest unit charge provision and the two apparent discrimination violations, and asserts that the violations did not occur intentionally. Atlin further maintains that WXIN's political rate card is not in violation of the lowest unit charge requirement. In this regard, Atlin explains that the "fixed" class on the political rate card is a combination of the fixed and preemptible-with-notice classes which are offered to commercial advertisers, and thus candidates were not denied the opportunity to purchase the preemptible-with-notice class of time. However, Atlin fails to discuss at all the Bureau's contention that WXIN apparently violated the lowest unit charge requirement by its failure to offer to candidates the higher immediately preemptible rates offered to commercial advertisers, as evidenced by the omission of these rates on the rate card.

DISCUSSION AND FINDINGS

5. Atlin does not take issue with the Bureau's findings that it apparently overcharged candidates on 14 specific occasions. Therefore, we find that WXIN repeatedly violated Section 315(b) of the Communications Act of 1934, as amended, and Section 73.1940(b) and (c) of the Commission rules in the manner and on the dates set forth in the attached Appendix. It appears that the licensee has rebated the overcharges to the affected candidates pursuant to the Bureau's April 25, 1990, NAL.[5]

6. We turn now to the circumstances surrounding WXIN's use of the political rate card. Section 315(b) was enacted in 1972 to guarantee legally qualified candidates a station's "lowest unit charge" for time purchased during the specified pre-election periods for the same class and amount of time for the same period. Congress intended to reduce increasing campaign expenditures by placing candidates "on par with a broadcast station's most favored commercial advertisers." S. Rep. No. 96, 92nd Cong., 1st Sess., (1971), *reprinted in* 1972 U.S. Cong. & Ad. News 1773, 1780. Under Section 73.1940(b) of the rules, which implements Section 315(b), all discount privileges which are offered to commercial advertisers must be available on equal terms to all candidates. This includes the right to purchase all classes of preemptible spots (*e.g.*, preemptible spots with notice, immediately preemptible spots, and run of schedule spots). *See also, Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981); *Public Notice on Lowest Unit Charge*, 4 FCC Rcd. 3823 (1988); *WHDH, Inc.*, 23 FCC 2d 763 (1967).

7. Atlin contends that its offer of only two classes of time to political candidates (in contrast to its offer of three classes to commercial advertisers) did not violate the lowest unit charge requirement. Atlin explains that WXIN established the political rates by eliminating the preemptible-with-notice rates offered to commercial advertisers and classifying them as political "fixed" rates. Atlin argues that this procedure provided more favorable rates to candidates for "fixed" spots that are guaranteed to run than the rates available to commercial advertisers. Except for three programs,[6] we agree with Atlin that WXIN's *political* non-preemptible "fixed" rate was the same rate as the preemptible-with-notice rate offered to commercial advertisers. Where the result of a pricing structure benefits the candidate, the Commission does not view it as failure to provide a "discount privilege."[7] However, Atlin does not address the apparent lowest unit

charge violations cited by the Bureau's NAL stemming from WXIN's failure to offer to political candidates the various levels in the "immediately preemptible" class of time.

8. WXIN's political and commercial rate cards for the fourth quarter of 1988 and the commercial invoices WXIN submitted reveal the following. The commercial advertisers were offered three classes of rates for spots, an immediately preemptible, a preemptible with seven days' notice, and a non-preemptible fixed rate. On the other hand, candidates were offered only two classes, an immediately preemptible rate, significantly lower than the immediately preemptible rate offered to commercial advertisers, and a non-preemptible fixed rate which, except for three programs (see footnote 6, *supra),* was the same rate as the preemptible-with-notice rate offered to commercial advertisers. Because the "immediately preemptible" rates -- the only preemptible rate apparently offered to candidates -- were lower than the lowest "immediately preemptible" rates that were offered to commercial advertisers, spots purchased at the "preemptible" political rate were not likely to run since they would have been preempted by the higher priced preemptible spots offered only to commercial advertisers. Thus, if a candidate wanted any assurance that spots would run, he or she apparently was constrained to purchase "fixed" time even though the assurance provided by the intermediate level of preemptible time available only to commercial advertisers may well have met his/her needs.[8] Atlin's response to the NAL does not in any way suggest that, despite the indications on its rate card,[9] candidates, in fact, were permitted to purchase time at the intermediate preemptible rate, as required by case law. *See Hernstadt v. FCC, supra.*[10]

9. Indeed, other evidence confirms that WXIN, in fact, refused to sell its intermediate preemptible rates when such rates were requested by a candidate. The Mass Media Bureau obtained an affidavit from Jan Crawford, who was President of Jan Crawford and Associates, Inc., a political consulting and media buying agency, during the 1988 campaign season. In her affidavit, Ms. Crawford states that during the 1988 Indiana primary and general elections, her agency represented Jack Wickes, a candidate for the United States Senate. In this capacity, Ms. Crawford states that she contacted WXIN in early September 1988 and asked about the "current selling levels" at which preemptible spots were being sold to commercial advertisers. According to the affidavit, Ms. Crawford was told by WXIN personnel that such rates were unavailable to candidates and that candidates wishing to purchase preemptible time were required to purchase preemptible spots at the "lowest unit rate" listed on the political rate card. Ms. Crawford then states that "[b]ecause the current selling level preemptible rates were higher than the rates shown on the political rate card, I knew that any time purchased at the political preemptible rates could not clear."

10. On May 8, 1991, the Mass Media Bureau forwarded the Crawford affidavit to Atlin for its comments. Although it contends generally that Ms. Crawford's assertions are conclusory and unsubstantiated, the response fails again to address the general issue raised by the affidavit and NAL, i.e. that the station's policy was to refuse to sell to candidates intermediate preemptible rates. Atlin states only that it "has no independent means to refute Ms. Crawford's opinion-based allegations," but does not in any way attempt to address, describe, or explain the station's policies with respect to the sale of intermediate preemptible time.

11. In the absence of any refutation whatsoever by Atlin, Ms. Crawford's affidavit provides persuasive evidence that WXIN violated Section 315(b) of the Act and Section 73.1940(b) of the Commission's Rules by refusing to sell to candidates discount privileges available to commercial advertisers. As stated in the NAL, WXIN's practice effectively forced candidates who wanted any assurance that their spots would run to purchase more expensive fixed time.

12. Atlin's claim that the Commission is punishing the licensee for remarks made by its then-General Sales Manager to a reporter is incorrect. The statements were not the basis for imposing a $10,000 forfeiture. Rather, they were merely the basis for initiating the inquiry into WXIN's sales practices. The results of that inquiry, as detailed herein, are the bases for the forfeiture.

13. Regarding WXIN's claim of inexperience in selling time to candidates and the statement that WXIN did not intentionally discriminate or overcharge candidates, licensees are expected to know and comply with the Commission's rules and regulations, and will not be excused for violations, absent clear mitigating circumstances. *Liability of Emporium Broadcasting Co.*, 23 FCC 2d 868 (1970). Moreover, whether the licensee intended to violate the law is not dispositive. The term "willful," as used in Section 503(b) of the Act, has been interpreted to mean simply that the acts were committed knowingly. *Midwest Radio-Television, Inc.*, 45 FCC 1137 (1963); *George E. Cameron Jr. Communications*, 93 FCC 2d 789, 792 n.7 (1983). Also, inexperience is not a mitigating circumstance. In any event, at the time of the violations, WXIN's parent company, Outlet, had been an experienced multiple owner of broadcast stations.

14. We have carefully considered Atlin's response and all the information before us and we are not persuaded to rescind or reduce the forfeiture. The violations in this case were serious and they continued over a substantial period of time. In conclusion, we find the violations to be willful and repeated, and remission of the $10,000 forfeiture to be unwarranted.

15. In view of the above and pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Outlet Communications, Inc. and Atlin Communications, Inc., former licensee of television station WXIN, Indianapolis, Indiana, FORFEIT to the United States the sum of ten thousand dollars ($10,000) for its willful and repeated violations of Section 315(b) of the Communications Act [47 U.S.C. Section 315(b)], and Sections 73.1940(b) and (c) of the Commission's rules [47 C.F.R. Sections 73.1940(b) and (c)].[11]

16. In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(b) of the Communications Act, as amended, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On January 23, 1990, the Video Services Division granted Atlin's application for assignment of WXIN's license to Chase Broadcasting of Indianapolis, Inc. (BALCT-891006KE). It was granted subject to the condition that Atlin and Outlet comply, jointly and severally, with any action taken by the FCC pursuant to this investigation. The sale was consummated on March 22, 1990.

[2] Section 315(b) of the Act and Section 73.1940(b) of the rules state:

> (b) *Charges for use of stations.* The charges, if any, made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed --
>
> (1) [d]uring the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period. . . .

[3] Section 73.1940(c) of the rules provides:

> (c) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage. . . .

[4] The April 25 NAL discussed twelve "lowest unit charge" and two discrimination violations. A list of these violations is contained in the attached Appendix.

[5] 5 FCC Rcd 2835 (1990); *See Alpha Broadcasting Corp.*, 102 FCC 2d 18 (1984). By letter of May 8, 1990, Atlin informed the Commission that WXIN intended to process refund checks to the candidates that were overcharged.

[6] The programs were "News Extra," "Star Trek: The Next Generation," and the Sunday evening "Fox Rotation."

[7] On these three programs, the "fixed" rates for candidates were priced higher than the preemptible-with-notice rates and the same as commercial "fixed" rates. We have decided to take no action with regard to these three programs.

[8] In fact, all 350 political spots sold during the time the political rate card was in effect ran only at fixed rates, and nearly all commercial advertisers ran at lower immediately preemptible rates during a two-week period examined by the Commission. (WXIN furnished, at the Commission's request, certain commercial invoices for the weeks of October 24 and 31, 1988).

[9] As we have previously stated, a broadcaster's affirmative duty to disclose to candidates information about rates and options offered to commercial advertisers is implicit in the lowest unit charge obligation. Because this affirmative disclosure duty was not expressly articulated until 1990, however, the failure of WXIN's political rate card to reference other available rates and options, standing alone, would not have warranted a forfeiture. *Compare KRON-TV*, FCC 91-409 (released December 12, 1991). This case, however, does not involve a mere failure to disclose to candidates information about available rates; as discussed below, paragraphs 9-11, WXIN refused to allow candidates to purchase time at these rates.

[10] Had candidates been permitted to purchase time at these rates, they would have gained a greater protection against preemption than was afforded by the low, candidate-only preemptible rate, and, moreover, could have received rebates. The *Public Notice on Lowest Unit Charge, supra*, stated that it "considers preemptible spot time as a single class of time for lowest unit charge purposes." We also stated that a "political candidate buying preemptible [without notice] spots who pays a higher rate for a particular . . . [time period] than that paid by other preemptible advertisers . . . will be entitled to a rebate." Therefore, it is clear that candidates are entitled to all levels of preemptibility offered to commercial advertisers, not only the lowest level.

[11] We note that the instant NAL was imposed prior to the Commission's issuance of new forfeiture standards. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under the new standards, the base amount for a lowest unit charge violation is $12,500. In this context, the Commission has recently imposed forfeitures of $25,000 for repeated violations of the lowest unit charge provision. *See KRON-TV*, FCC 91-409 (released December 12, 1991); KDFW-TV, FCC 91-406 (released December 12, 1991).

APPENDIX

WXIN discovered the following eight overcharges to candidates:

Candidate	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged	Lowest Unit Charge	Excess
John Mutz	10/22/88 SA	10 pm - 11 pm	30	$575	$500	$ 75
	10/22/88 SA	11 pm - 12:30 am	30	350	300	50
	10/23/88 SU	9 am - 12 noon	30	270	230	40
	10/30/88 SU	9 am - 12 noon	60	540	460	80
	11/06/88 SU	9 am - 12 noon	60	540	460	80
						$325
Evan Bayh	10/30/88 SU	7 pm - 10:30 pm	30	$1000	$ 725	$275
	10/29/88 SA	7 pm - 8 pm	30	1025	1000	25
	11/05/88 SA	7 pm - 8 pm	30	1025	1000	25
						$325

The Commission found an additional four violations of the lowest unit charge provision, which occurred during the 45-day period before the primary on May 3, 1989:

Candidate	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged	Lowest Unit Charge	Excess
John Mutz	4/25/88 MO	8 pm - 10 pm	30	$425	$375	$ 50
	4/27/88 WE	8 pm - 10 pm	30	425	375	50
	4/28/88 TH	8 pm - 10 pm	30	425	375	50
	5/03/88 TU	8 pm - 10 pm	60	850	750	100
						$250

The Commission also found two violations of the no-discrimination rule. The Democratic candidate for governor was charged more than his Republican opponent for the same class, length and period of time on the following two occasions. (These violations occurred prior to the 60-day period before the general election of November 8, 1988.)

Candidate	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged	Excess
John Mutz	8/29/88 MO	9 pm - 11 pm	30	$270	0
	9/02/88 FR	9 pm - 11 pm	30	270	0
Evan Bayh	8/29/88 MO	9 pm - 11 pm	30	325	$ 55
	9/02/88 FR	9 pm - 11 pm	30	325	55
					$110

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of
Station WWOR(TV), Secaucus,
New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For a Construction Permit
Secaucus, New Jersey

APPEARANCES

Michael R. Gardner, *Charles R. Milkis*, and *David B. Jeppsen* on behalf of WWOR-TV, Inc.; *John K. Cooper* (Pfalz & Woller) and *Roy W. Boyce* (Cohen and Berfield, P.C.) on behalf of Garden State Broadcasting Limited Partnership; *Charles E. Dziedzic*, *Y. Paulette Laden*, and *Gary P. Schonman* on behalf of Chief, Mass Media Bureau.

DECISION

Adopted: December 27, 1991; Released: January 22, 1992

By the Commission:

I. INTRODUCTION

1. In this proceeding, WWOR-TV, Inc. (WWOR) seeks renewal of its license to operate station WWOR-TV, channel 9, in Secaucus, New Jersey. Garden State Broadcasting Limited Partnership (Garden State) has filed a mutually exclusive application for a construction permit for a new facility on channel 9. Now before the Commission is an initial decision on remand by Administrative Law Judge Richard L. Sippel denying a proposal by the parties to settle this proceeding. *WWOR-TV, Inc.*, 6 FCC Rcd 4350 (I.D. 1991). Under the terms of the settlement, Garden State would dismiss its application in return for payment of $2 million. The ALJ found that, contrary to 47 U.S.C. § 311(d)(3)(B), Garden State's application was filed for the purpose of reaching a settlement agreement. The ALJ also found that in so doing Garden State committed an abuse of the Commission's processes, which was compounded by misrepresentation and lack of candor; thus, he found that Garden State was unqualified to be a Commission licensee.

2. For the reasons which follow, we find that Garden State abused the Commission's processes by filing its application for the primary purpose of achieving a settlement. We also find that Garden State lacked candor in connection with this proceeding. Accordingly, we will deny Garden State's application for a construction permit without conducting further proceedings. Additionally, we find no merit to Garden State's allegations that issues should be added against WWOR. We will therefore grant renewal of WWOR's license to operate station WWOR-TV.

II. BACKGROUND

3. To understand the issues here, it is useful to set forth the somewhat complex procedural history leading up to the matters now before us. That history involves not only Garden State, but also an entity sharing some common principals with Garden State, Mainstream Television Limited Partnership (Mainstream). As will be seen, both the Mainstream and Garden State litigation culminated in settlements, a factor that contributed to the issues before us.

4. *Mainstream litigation.* Channel 9 was formerly a New York City station licensed to RKO General, Inc. (RKO). The Commission designated channel 9 for hearing on questions concerning RKO's basic and comparative qualifications. The Commission terminated that proceeding on March 29, 1983, after RKO, pursuant to an act of Congress, requested that channel 9 be reallocated to Secaucus. *RKO General, Inc. (WOR-TV)*, 53 RR 2d 671 (1983), *aff'd sub nom. Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (1984), *cert. denied*, 469 U.S. 1017 (1984). Subsequently, on June 4, 1986, RKO requested permission to assign channel 9 to a subsidiary of MCA, Inc. (MCA), until recently the parent corporation of WWOR.

5. Shortly before that, on March 31, 1986, Mainstream filed a petition seeking to have RKO's license for channel 9 set for early renewal and filed a mutually exclusive application for a construction permit. (RKO's license would otherwise have expired on March 12, 1988. *See Channel 9 Reallocation (WOR-TV)*, 53 RR 2d 469, 472a ¶ 15 (1983).) After RKO and MCA filed their assignment application, Mainstream filed a petition to deny the assignment.

6. Mainstream consisted of one general partner, Jean Wells (equity interest 3.75 percent), and several limited partners. *See WWOR-TV, Inc.*, 6 FCC Rcd 131, 132-33 ¶¶ 10-19, 134 ¶ 29 (I.D. 1991). One of the limited parters, Richard Rynd, in conjunction with Mainstream's counsel, Lewis I. Cohen, was instrumental in organizing Mainstream. Rynd's cousin, the late Sidney Fetner,[1] was one of Mainstream's limited partners. (As will be seen, Wells, Fetner, and Cohen are also associated with Garden State.)

7. The Commission, on December 9, 1986, rejected Mainstream's allegations, dismissed Mainstream's application, and approved the assignment of channel 9 from RKO to MCA's subsidiary. *RKO General, Inc.*, 1 FCC Rcd 1081 (1986). Mainstream thereupon appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit. 6 FCC Rcd at 134 ¶¶ 25-29. Mainstream's appeal was terminated by a settlement agreement in which RKO paid Mainstream $5.37

million on April 1, 1987. Of that amount, Wells received $178,694, Fetner received $1.3 million, and Cohen's law firm was paid $528,500. MCA commenced operation on channel 9 on April 3, 1987. *Id.* at 134 ¶ 30.

8. *Garden State litigation.* On December 21, 1987, WWOR, then a subsidiary of MCA, filed the renewal application now before us. Two days later, Garden State filed its application for a construction permit. As was Mainstream, Garden State is a limited partnership with Wells as the sole general partner (equity interest 4 percent). 6 FCC Rcd at 134-35 ¶¶ 31-36. Fetner was one of several limited partners, and Cohen served as Garden State's counsel.

9. On August 31, 1988, WWOR challenged the propriety of Garden State's application in a motion to enlarge issues. WWOR contended that Garden State's application was filed for the improper purpose of achieving a settlement, contrary to the provisions of 47 U.S.C. § 311(d)(3). (The Commission may not approve a settlement filed for the purpose of reaching or carrying out a settlement agreement.) The ALJ granted WWOR's motion and specified an issue. *WWOR-TV, Inc.*, FCC 88M-3567 (Oct. 25, 1988).[2] Nonetheless, on September 27, 1990, the parties submitted a settlement agreement. (As will be seen, WWOR terminated the settlement on September 3, 1991, thereby rendering moot the parties' joint request for approval of the settlement.)

10. In a partial initial decision, the ALJ concluded that Garden State had not abused the Commission's processes by acting contrary to 47 U.S.C. § 311 in filing its application, and approved the settlement agreement. *WWOR-TV, Inc.*, 6 FCC Rcd 131 (I.D. 1991). The Commission, however, reviewed the partial initial decision on its own motion and concluded that the existing record was inadequate to resolve certain material questions of fact. The Commission therefore remanded the case to the ALJ for further deliberations. *WWOR-TV, Inc.*, 6 FCC Rcd 1524 (1991), *recon. dismissed*, 6 FCC Rcd 4879 (1991). After remand, the ALJ found that Garden State had filed its application for the improper purpose of reaching a settlement, denied the settlement, and denied Garden State's application. Garden State has appealed.[3]

III. ABUSE OF PROCESS

11. *Partial Initial Decision.* In connection with his initial consideration of whether Garden State filed its application for the purpose of reaching a settlement, the ALJ heard the testimony of Cohen and Wells, the two surviving individuals with first-hand knowledge concerning the circumstances surrounding Garden State's formation. The ALJ found that Fetner had discussed the subject of additional broadcast ventures with Cohen around the time of the Mainstream settlement on or about March 2, 1987. 6 FCC Rcd at 131 ¶ 31. According to Cohen's testimony, Fetner asked Cohen to advise him of any speculative opportunities in broadcasting. The witnesses testified that in a subsequent telephone conversation between Cohen and Wells -- which occurred sometime between April 15, 1987 and July 16, 1987 -- Wells expressed criticism of channel 9's programming, which she considered unresponsive to the needs of northern New Jersey. *Id.* at 134-35 ¶ 32. Cohen relayed the substance of his conversation with Wells to Fetner, and Fetner requested that a meeting be arranged. *Id.* at 135 ¶ 33.

12. Cohen, Wells, Fetner, and Fetner's wife met for dinner in New York. 6 FCC Rcd at 135 ¶¶ 33-35. The ALJ found that the evidence did not establish the date of this meeting. At the dinner meeting, Fetner offered Wells an interest in a limited partnership to be formed to challenge channel 9's renewal, and within a few days Wells accepted Fetner's offer.

13. The principals then formed Garden State, prepared a budget, made financial arrangements, and filed an application. 6 FCC Rcd at 135-36 ¶¶ 36, 40-43. As part of this effort, Garden State paid a consultant approximately $19,000 to prepare an analysis of channel 9's programming. Garden State's total expenditures for expert and technical assistance were around $30,000.

14. The ALJ also made findings concerning the negotiations leading to the settlement agreement. 6 FCC Rcd at 136 ¶¶ 44-47. While proceedings were going on before the FCC, MCA (then WWOR's parent corporation) was also suing Garden State in federal district court for allegedly violating the Mainstream settlement, which MCA contended barred Garden State's challenge. *Id.* at 140 n.9. After the judge in that court action asked for a status report on settlement, WWOR's counsel arranged to meet with Cohen to discuss settlement. *See* tr. 1096, 1446, 1571. Three meetings occurred between January 1990 and May 1990, but no settlement resulted. In mid-September MCA was engaged in negotiations with an international corporation, which sought to acquire MCA. *See* paragraph 64, below. These negotiations heightened MCA's interest in settling with Garden State. Garden State ultimately accepted an MCA offer of $2 million.

15. The ALJ concluded that the record failed to demonstrate that Garden State filed its application with an intent to obtain a settlement. 6 FCC Rcd at 136-37 ¶¶ 49-50. He observed, for example, that, although the retainer agreement with Cohen's law firm provided for a bonus in the event of a settlement, it also provided for a bonus if Garden State were to win a license. The ALJ noted that Garden State had been vigorously prosecuting its application. Garden State had submitted evidence, filed numerous pleadings, and expended approximately $30,000 on expert and litigation assistance.

16. The ALJ also noted the Bureau's complaint that the record did not establish when the meeting between Wells, Fetner, and Cohen took place. 6 FCC Rcd at 137-38 ¶¶ 51-56. Thus, it was impossible to determine what opportunity Wells had to review channel 9's programming before Garden State was initiated. The ALJ considered this a material question but found that any adverse inference that could be drawn from the lapses in the witness' memories was offset by the probative value of Garden State's vigorous prosecution.

17. *Remand order.* The Commission remanded this proceeding because it found that the witness' inability to fix the dates of pertinent discussions made it impossible to evaluate the question of whether Garden State was formed after its principals had a reasonable opportunity to monitor channel 9's programming. 6 FCC Rcd at 1525-26 ¶¶ 8-10, n.8. In this regard, the Commission disagreed with the ALJ that Garden State's prosecution of its application was sufficient to establish the *bona fides* of the application without further inquiry into this point.[4]

18. *Initial Decision on Remand.* On remand, the ALJ held further hearings and found that documentary evidence from Fetner's business records and those of Cohen's law firm conclusively demonstrated that the dinner

meeting involving Wells, Cohen, and Fetner took place on April 30, 1987 -- only three weeks after MCA (*i.e.*, WWOR) commenced service on channel 9 after its assignment from RKO. 6 FCC Rcd at 4351 ¶ 8.[5] The ALJ found that the chronology established by the documentary evidence, which placed the inception of Garden State almost immediately after the Mainstream payoff and the commencement of service by WWOR, warranted a reevaluation of the testimony of Cohen and Wells. *Id.* at 4355 ¶ 18, 4362 ¶ 58.

19. In particular, the ALJ found that the documentary evidence undermined the credibility of their previous testimony that Garden State was formed in response to Wells' criticism of channel 9's programming. 6 FCC Rcd at 4355-56 ¶¶ 18-20. The ALJ observed that Wells had originally testified that she would not have voiced such criticism as early as April, since MCA had just taken over the station and it would not have had time to make significant changes in programming. The ALJ found that at the remand hearing Garden State significantly revised its theory of the case to deemphasize the significance of Wells' purported dissatisfaction with channel 9's programming. *Id.* at 4354-55 ¶¶ 16-18, 4362 ¶ 56. The ALJ therefore rejected Garden State's earlier account of the discussions leading to its formation as lacking credibility. *Id.* at 4355-56 ¶¶ 20-21. In light of Garden State's failure to present a credible account of its formation, the ALJ concluded that Fetner's stated intent to speculate and the principals' presumed awareness that a settlement was an option in a proceeding such as this established that they formed Garden State to achieve a settlement. The ALJ concluded that Garden State abused the Commission's processes by filing its application with the improper motive of reaching a settlement and made a misrepresentation in certifying that it did not file for this purpose. *Id.* at 4366 ¶ 75.

20. *Exceptions*. Garden State contends that the ALJ had no basis to reconsider his prior finding that Garden State did not file its application to achieve a settlement. Garden State points out that the only relevant new fact developed on remand is that the initial meeting between Fetner, Wells, and Cohen occurred on April 30, 1987. According to Garden State, the precise date of the meeting has no decisional significance. In this regard, Garden State notes that Cohen testified at the original hearing that his conversation with Wells might have occurred as early as April. Garden State argues that the inconsistencies between the testimony of Wells and Cohen merely represent faded memory -- which is not surprising since the witnesses testified four years after the events in question.

21. Additionally, Garden State asserts that the record contains no indication that the parties seriously discussed settlement before January 1990. Garden State further asserts that the record demonstrates that Cohen discerned in Wells' comments on programming a potential basis for a legitimate challenge to WWOR, which he conveyed to Fetner. According to Garden State, the parties conscientiously prosecuted their application based on these grounds.

22. Garden State suggests that the ALJ based his adverse conclusions on an erroneous impression that Commission policy treats any applicant challenging a renewal as presumptively suspect. Similarly, Garden State accuses the ALJ of unrealistically requiring it to demonstrate that it filed its application out of disinterested altruism.[6]

23. *Reply*. The Bureau supports the initial decision. According to the Bureau, it is significant that Garden State's principals decided to file a challenge less than a month after the Mainstream settlement. The Bureau maintains that the timing of this decision makes Garden State's testimony regarding dissatisfaction with programming incredible. Having nullified the reason for filing given by Garden State, the Bureau submits that Garden State's primary purpose was to secure a settlement.

24. *Discussion*. The issue before us is whether Garden State abused the Commission's processes by filing its application "for the purpose of reaching or carrying out [a settlement] agreement", which is proscribed by 47 U.S.C. § 311(d)(3)(B). As we have noted elsewhere, "abuse [of process] is not an easy matter to prove." *Memorandum Opinion and Order in BC Docket No. 81-742*, 5 FCC Rcd 3902, 3903 ¶ 8 (1990). To some extent this reflects flaws in the licensing process -- including the comparative renewal system -- that we have attempted to correct prospectively through Rule Making. In so doing, we recognized that incentives and mechanisms for abuse, such as filing an application for the purpose of achieving a settlement, have been inherent in the licensing process. *First Report and Order in BC Docket No. 81-742*, 4 FCC Rcd 4780, 4782 ¶ 21 (1989). Nonetheless, the process allows even an applicant with apparently little chance of prevailing a right to prosecute its application. *RKO General, Inc. (WOR)*, 4 FCC Rcd 4072, 4073 ¶ 7 (1989). Moreover, where the facility being challenged appears profitable, even the most insincere applicant -- such as one whose actual expectation is to receive a settlement -- can credibly proclaim its interest in becoming the licensee. *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 FCC Rcd 5179, 5182 ¶ 25 (1988).

25. Given these difficulties, we will not infer improper purpose in filing an application or pleading without a specific showing of improper motivation. *RKO General, Inc. (WOR)*, 4 FCC Rcd at 4073 ¶ 7.[7] *See also Radio Carrollton*, 69 FCC 2d 1139, 1151-52 ¶ 26 (1978), *recon. denied*, 72 FCC 2d 264 (1979). In this regard, we find two factors especially probative as indications that Garden State filed its application for the primary purpose of achieving a settlement -- a purpose prohibited by the Communications Act. First, we find that, in attempting to persuade the Commission that its application was not filed for the purpose of reaching a settlement, Garden State gave an account of its intent that was at best without credibility and at worst false and misleading. This account principally relies on Wells' purported role in initiating the challenge. Second, we find that the remaining evidence bearing on Garden State's purposes, especially that concerning Fetner's intentions, does not demonstrate a primary interest in broadcast ownership. Rather, the circumstances readily lend themselves to the conclusion that Fetner was interested in receiving a settlement payoff. This is particularly so in light of the fact that the crucial meeting between Fetner, Cohen, and Wells, leading to the formation of Garden State, occurred almost immediately after these same three individuals received substantial payoffs from the Mainstream settlement.

26. *Wells' role*. In urging the Commission to approve the settlement agreement in this proceeding, Garden State submitted a declaration by Wells stating in part:

> The application of Garden State was not filed for the purpose of reaching or carrying out this settlement agreement but for the purpose of constructing and operating the station. I believed that Garden State's challenge was justified based on my perception that there was a substantial basis for questioning the adequacy of WWOR-TV's service to the Northern New Jersey area where I reside.

Garden State Exh. 6 at 1. Our review of the record discloses that, in explaining and supporting this assertion, Garden State and its principals lacked candor by exaggerating the role of Wells' concern over programming as motivation for Garden State's challenge. In this regard, it is highly instructive to compare the accounts of Garden State's formation given by Garden State and its principals before and after the remand, when it became possible to fix with precision the date of the pertinent discussions and meeting.

27. At the original hearing, Cohen's testimony indicated that Wells, in her initial conversation with Cohen, voiced serious criticism of channel 9's programming based on careful study. He testified:

> [Wells] said to me I really can't believe it, but I've been watching WWOR a lot, every minute I have a chance and I cannot believe it, but the non entertaining [*sic*] programming and the news programming is just like it was under RKO. . . . And she said she'd been watching it a lot and she rattled off to me the news programs that she had reference to and the non entertainment programs she had reference to.

Tr. 1429.

> She also told me that she was -- she believed after her viewing, that the station was not acting as an outlet for local expression in Northern New Jersey. She said that hadn't changed, it hadn't done that, in her view, under RKO's stewardship and it wasn't doing it under MCA's stewardship. And she said that she thought that that was something that was very important.

Tr. 1531-32. Cohen also testified that Wells had definite plans for taking action against WWOR:

> Mrs. Wells told me, as I recall, that Mainstream's application had never been accepted by the Commission and she was aware that MCA had to file an application for renewal of license. She was also aware that there would be -- that a new entity such as Garden State would have an absolute right to be compared against MCA, which was not the situation earlier.

Tr. 1531. In describing the dinner meeting with Wells and Fetner, Cohen furthered the impression that the decision to form Garden State was a response to Wells' concern about programming:

> So, at the meeting, the purpose of the meeting -- the discussion at the meeting was that [Fetner] asked [Wells] many, many, many questions about what she had been viewing, and why she felt the way she did, and how systematically she had been viewing it....

Tr. 1445.

28. Wells' original testimony also stressed the role that her dissatisfaction with channel 9's programming played in spurring the formation of Garden State.[8] Indeed, Wells' insistence that her conversation with Cohen could not have occurred as early as April 1987 (as Cohen had suggested) was premised on her conviction that she would not have made an adverse judgment about channel 9's programming so soon after MCA took over. Tr. 1835-36. In her version of the dinner meeting, Wells also emphasized her dissatisfaction with channel 9's programming and her intention to change it. She stated:

> Well, the essence of the conversation [at the dinner meeting] was that I was interested in programming on Channel 9 and felt that they were not -- it was a similar situation as RKO, that they were not interested in New Jersey, that they were interested in the broader market of the Tri-State area and that I thought that I could do a better job in doing that, in running the station as a viable New Jersey medium.

Tr. 1741.

29. Garden State relied on this testimony in arguing the validity of its proposal to the ALJ: ". . . Garden State's challenge was premised from its inception[9] on perceived inadequacies in WWOR-TV's service to the Northern New Jersey area it is licensed to serve." *Proposed Findings of Fact and Conclusions of Law* filed December 13, 1990 by Garden State at 17 ¶ 29. Similarly: "The underlying issue, however, is whether Garden State pursued its challenge based on perceived deficiencies in the service of WWOR-TV. . . . [there is] no basis for speculative innuendo that the substance of the initial discussions was not accurately recounted to the best of the participant's ability after a passage of almost four years." *Reply to Proposed Findings of Fact and Conclusions of Law* filed December 20, 1990 by Garden State at 2 ¶ 2.

30. The discovery of unequivocal evidence that the dinner meeting, and thus the initial conversation between Cohen and Wells, occurred in April 1987 (just three weeks after MCA took control of channel 9) undermined the credibility of this testimony and revealed its misleading character. Garden State and its principals implicitly acknowledged as much by substantially revising their theory of the case following remand to deemphasize Wells' dissatisfaction with channel 9's programming as a motivating factor.

31. After remand, Wells denied that she had made a firm judgment about channel 9's programming at the time she spoke to Cohen and met with Fetner (in keeping with her earlier statement that she would not have made such a judgment so soon after MCA took control). Tr. 2176-77. Rather, she testified: "Well, in a casual remark to Mr. Cohen I said to him that I had been watching Channel 9 and that nothing had changed and he told me that was interesting." Tr. 2177.

32. Accordingly, in Wells' post-remand account of the dinner meeting, her concern over programming was not the only or even the main basis for the decision to challenge channel 9. Wells' described another basis as: "My own -- Mr. Cohen's business -- Mr. Fetner's business interests, for one thing, in going forward with this. Without him there would have been no money." Tr. 2178. In this regard, Wells further testified:

> Q: But on the basis of what you watched, the decision was made to invest literally thousands of dollars to challenge the license renewal of a major independent station, is that correct?
>
> A: I don't know that that was the only basis. I can't -- obviously, other people had, you know -- there was an investment, so it wasn't just based upon the basis of my watching the programming. But it added an area on which to base -- on which to begin the basis of a challenge.

Tr. 2179.

Wells' explained her reference to an "investment" as follows:

> Sidney Fetner was investing money in the partnership and getting other friends and relatives to invest money in the partnership, hoping to become an owner of Channel 9.

Tr. 2195.

33. Garden State's arguments on remand reflect this changed testimony:

> The dinner meeting was the result of a casual remark by Ms. Wells to Mr. Cohen to the effect that the Channel 9 programming had not changed after the transfer to MCA. . . . [H]er remark to Mr. Cohen was not intended as a final judgment on MCA's service. . . . It was Mr. Cohen who perceived in her remark a matter of sufficient interest to bring to Mr. Fetner's attention. Her observation was one of several factors which provided a basis to begin a challenge, including Mr. Fetner's interest . . . .

Remand Proposed Findings of Fact and Conclusions of Law filed May 17, 1991 by Garden State at 3-4 ¶ 3.

> There is no statutory or Commission requirement that Garden State have had "*bona fide* beliefs" that WWOR-TV's program[ming] was deficient and would not change. . . . [I]t is perfectly permissible to file an application based on the mere hope of ultimately discrediting an opponent.

Reply Findings of Garden State Broadcasting Limited Partnership filed May 24, 1991 at 10 ¶ 12.

> The initial remark by Ms. Wells which led to the dinner meeting was . . . a casual remark that merely noted a fact, i.e., that there had been no change in programming. This remark did not suggest that the programming would never change nor was it intended to suggest that a challenge be made for the license. The possible significance of Ms. Wells' remark was recognized by counsel who communicated it to Sidney Fetner whose interest led to the April 30, 1987 dinner meeting. Ms. Wells' observation was one factor in the decision to go forward, along with Mr. Fetner's interest . . . .

Id. at 10-11 ¶ 13.

> Ultimately, the Bureau's conclusion . . . that "concern over the programming was not the *reason* for the challenge . . . is in one sense correct. The Bureau errs, however, in asserting that Garden State ever claimed that the *reason* for its filing was its purely abstract "concern over programming." The *reason* for the challenge was Ms. Wells' desire to operate Channel 9. The lack of change in programming already observed as well as skepticism that this would change provided one basis (along with others) for believing that there existed a sufficient likelihood of success to justify going forward. It was not, however, the underlying *reason* nor did Garden State ever so claim.

Id. at 12 ¶ 14. (Emphasis in the original.)

34. We find that the foregoing demonstrates that Garden State, in urging that its application was not filed for the purpose of reaching a settlement, gave a misleading account of the circumstances leading to its formation. Garden State's original account left the clear impression that Wells' dissatisfaction with channel 9's programming and her desire to "do a better job" provided primary motivation for mounting a challenge. Thus, relying on the original testimony of its witnesses, Garden State emphasized that its challenge was based "from its inception" (which we now know occurred in April 1987) on "perceived" inadequacies in channel 9's programming. Garden State's original characterization of the facts strongly suggested that Cohen's role was merely to bring the motivated Wells to the attention of an interested financier.

35. On remand, however, confronted by the early date of the dinner meeting, Garden State disavowed much of the significance of the deficiencies in channel 9's programming "perceived" by Wells in the "inception" of Garden State's challenge. Under Garden State's revised theory, Wells' "casual" comments to Cohen neither reflected criticism of channel 9 nor expressed an interest in mounting a challenge. Rather, Garden State now characterizes its perception of channel 9's programming, at the inception of its challenge, as a "mere hope of ultimately discrediting WWOR" and "one of several factors that provided a basis to begin a challenge." In Garden State's new version, Cohen, knowing of Fetner's interest in an investment, became an active agent independently formulating the idea of a challenge on the colorable basis of channel 9's programming. Garden State now portrays Wells as more of a recruit and less of a moving force.[10]

36. Thus, as aptly noted by the ALJ (6 FCC Rcd at 4362 ¶ 58), the production of evidence firmly establishing the date of the April 30, 1987 meeting resulted in the "collapse" of Garden State's original account of its formation. We cannot lightly disregard this discrepancy. Garden State's original account was its chosen means of demonstrating that it did not file its application for the purpose of reaching or carrying out a settlement. The failure

of this explanation casts grave doubts on Garden State's motivation. In particular, it suggests that Garden State's explanation was intended to conceal the fact that the true purpose in filing its application was improper. We therefore closely scrutinize the remaining evidence.

37. *Fetner's purposes.* As discussed above, the record does not support Garden State's original claims that Wells was a moving force in initiating the challenge to channel 9 and that her purposes were a primary motivation for the challenge. Thus, we find that the most meaningful indication of Garden State's true purpose in filing its application lies in the nature of Fetner's interest in the project, although he was nominally only a passive limited partner. In this regard, the record demonstrates Fetner's central importance as a moving force behind Garden State's challenge. Fetner sought the meeting with Wells at which he offered her a four percent interest in a limited partnership to challenge WWOR. 6 FCC Rcd at 135 ¶¶ 33, 35. Fetner agreed to arrange for the financing of the venture and selected all of the limited partners, who were his family and friends. *Id.* at 135 ¶ 37. Only Fetner discussed the partnership retainer agreement with Cohen. *Id.* at 135 ¶ 37.

38. We have carefully examined Cohen's account of Fetner's stated intentions in the formation of Garden State, where Cohen had the opportunity to characterize Fetner's intentions in the most favorable light possible. It is therefore striking that Cohen's own account fails to establish that Fetner had a primary intention to become a broadcast owner. Rather, Cohen's own words readily lend themselves to the interpretation that Fetner primarily expected to receive a settlement payoff -- or that a payoff would serve his purposes at least as well as the award of a license. According to Cohen, Fetner indicated that:

> . . . he had a lot of resources, financial resources available and that he was interested in what he called speculative kinds of situations where he could risk money and get a real big reward.

Tr. 1424-25. Significantly, when Cohen suggested to Fetner that he buy a broadcast station, Fetner reportedly rejected the idea stating:

> . . . that he had reached the stage in his life where he was looking to do things that were fun. He wanted to do things that gave him excitement and that were different and unique where he had fun and that owning[11] a television station, just buying a television station, to him, wasn't what he was looking for. He said he owned lot of businesses. . . . He liked the challenge and the chase.

Tr. 1425. As Garden State suggests, these words do not rule out the possibility that Fetner was interested in acquiring a station at low cost through the comparative renewal process. *See* tr. 1448. However, these words do not affirmatively support that interpretation. Rather, the emphasis on "gamesmanship" in this testimony tends to negate any idea that Fetner was expressing a primary interest in "owning and operating" a facility. *See* tr. 1424. This emphasis suggests, indeed, that Fetner was at best indifferent to the mechanism by which the return on his speculative investment might be produced.

39. The context in which Fetner made these statements -- within days of the Mainstream settlement (Fetner's only other broadcast venture), in which he received a $1.3 million payoff on an investment of $21,428 -- also bears on the question of Fetner's likely state of mind. *See* 6 FCC Rcd at 134 ¶¶ 29, 31; tr. 1426. Whether or not Fetner and Cohen expressly discussed the prospects for settlement, the possibility of settlement was an inescapable reality. Thus, filing a further application for the purpose of reaching another settlement would represent an entirely logical outgrowth of Fetner's recent experience. By contrast, the record discloses no circumstances that would provide a foundation for believing that Fetner had a primary interest in ownership of channel 9.

40. All told, there is enough ambiguity concerning Fetner's intentions, as described by Cohen, to make this a close case, were it necessary to decide the case solely on the basis of Cohen's testimony about Fetner's intentions. The proponderance of the evidence in the case as a whole, however, weighs against Garden State -- including reliance on the negative inferences to be drawn from Garden State's own failures of proof. We find it significant that Garden State originally chose to substantiate its claim that it had not filed for the purpose of reaching a settlement with an account that we find at best grossly unreliable. *See Bird Provision Co. v. Owens Country Sausage, Inc.*, 379 F.Supp. 744, 751 (N.D. Tex. 1974) (when a party fabricates evidence, it is proper to draw unfavorable inferences against it). Additionally, Garden State's own account of Fetner's crucial interest in prosecuting the application -- together with the proximity of the Mainstream settlement -- readily lends itself to the conclusion that Fetner was interested in receiving a settlement payoff.

41. In view of the foregoing, other factors that Garden State cites as demonstrating the *bona fides* of its application have little probative value. These factors are: (1) that Garden State vigorously prosecuted its application; (2) that Garden State hired an expert and took other steps to substantiate its claims that channel 9's programming was deficient; and (3) that WWOR, and not Garden State, initiated settlement discussions. If the record were bare in other respects, these factors could provide support for the claim that Garden State had a primary interest in prosecuting its application on its merits. Here, however, the record contains evidence specifically impeaching Garden State's purported intent in filing its application. Under these circumstances, the factors relied on by Garden State demonstrate no more than that Garden State had taken the minimal steps to make its application credible in anticipation of receiving a settlement.[12] Garden State's attempt to establish that it did not intend to pursue a settlement is especially unpersuasive since the abuse of process issue was designated early in the proceeding, which would tend to deter Garden State from pursuing a settlement.

42. We therefore find that, based on the record before us, the preponderance of the evidence shows that Garden State filed its application primarily for the purpose of achieving a settlement. This conduct would warrant rejection of the settlement (if it were still pending) under 47 U.S.C. § 311(d) and also warrants denial of Garden State's application as an abuse of process under the added basic qualifications issue.

IV. LACK OF CANDOR

43. *Initial Decision on Remand.* As an additional matter related to the abuse of process issue, the ALJ considered whether Garden State deliberately withheld evidence establishing the date of the dinner meeting between Wells, Fetner, and Cohen, now known to be April 30, 1987.

44. The ALJ observed that in its proposed findings of fact and conclusions of law, filed at the original hearing, the Bureau criticized Garden State for failing to establish the dates of the conversation between Wells and Cohen and the meeting. 6 FCC Rcd at 4364 ¶ 64. The Bureau asserted that the dates were related to the credibility of Wells' claim that she had an opportunity to evaluate channel 9's programming and contended that Garden State should produce business documents establishing the dates. *Id.* at 4364-65 ¶¶ 64, 67. According to the ALJ, Garden State made no attempt to conduct a search responsive to the Bureau's concerns about the dates and instead characterized these concerns as "quibbles." *Id.* at 4363 ¶ 65. The ALJ noted that in his partial initial decision, he rejected Garden State's assertion that the dispute over dates was a "quibble." He characterized the question involved as a "material circumstance." The ALJ found, however, that, despite his statement of concern in the partial initial decision, Garden State made no effort to reopen the record to provide relevant evidence. *Id.* at 4365 ¶ 67.

45. The ALJ found that, nonetheless, within six days after the release of the Commission's remand order, Garden State produced highly reliable evidence of the dates. 6 FCC Rcd 4364 ¶ 66. This evidence consisted of Cohen's airline ticket to New York City dated April 30, 1987 and a credit card receipt, also dated April 30, for Jake's restaurant (where Cohen met with Wells before the dinner meeting). *Id.* at 4351 ¶ 8. Additionally, Fetner's widow, Sondra, recovered from among Fetner's papers an April 30 credit card receipt for Marcella's restaurant, where the dinner meeting took place.

46. The ALJ found that Garden State deliberately ignored the Bureau's and the ALJ's concerns, despite recognizing their significance, because Garden State did not want to risk uncovering any new evidence that might jeopardize approval of the settlement. 6 FCC Rcd at 4364-65 ¶¶ 64, 66-67. The ALJ found that Garden State sought the readily available evidence only after it realized that the case would be remanded for taking further evidence and that the Bureau would almost certainly seek the relevant documents. Thus, the ALJ concluded that Garden State lacked candor by seeking to insure that significant evidence would remain concealed, until that course was no longer expedient.

47. *Exceptions.* Garden State denies that it lacked candor in failing to introduce evidence of the date of the dinner meeting prior to remand.[13] Garden State observes that Cohen did not misstate the extent of his efforts to pinpoint the date (by checking his diary), that he had no actual knowledge that pertinent documents existed in his firm's records, and that his own testimony suggested that the date of the dinner meeting might have been in April.[14] According to Garden State, it simply did not occur to Cohen, who was also occupied with other aspects of trial preparation, to consult business records at that point.

48. Garden State also asserts that neither the ALJ nor the Bureau originally considered Garden State's failure to pinpoint the date decisionally significant (since each recommended approving the settlement despite the failure to establish the date). Garden State insists that it was under no obligation to follow the Bureau's suggestion that Garden State search its business records. Additionally, Garden State maintains that "counsel's purported failure [to conduct such a search] would not have precluded efforts to pursue the matter had other parties decided to do so. . . ." *Exceptions and Brief* filed August 14, 1991 by Garden State at 16.

49. *Reply.* The Bureau contends that Garden State lacked candor in failing to produce evidence in its possession until, in effect, forced to do so by the Commission's expression of concern. The Bureau characterizes this as a form of "gamesmanship" condemned in *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981). According to the Bureau, such conduct falls within the definition of lack of candor, which includes concealment, evasion, and other failures to be fully informative. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983). The Bureau asserts that Garden State's intent to deceive can be inferred because Garden State was on notice of the potentially crucial significance of the relevant date.

50. *Discussion.* We find that Garden State violated its duty of candor by failing to produce evidence demonstrating the date of the April 30 meeting at the original hearing. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 229-30 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982) (licensee disqualified for failing to come forward with a candid statement of relevant facts after another party put a question before the Commission). Following the designation of the abuse of process issue, WWOR specifically sought the production of:

> All documents relating to the formation and operation of Garden State, including . . . all documents relating to or reflecting any meetings, contacts or communications among Garden State's principals...regarding the formation of Garden State....

Second Motion of WWOR-TV, Inc. for Order Requiring Production of Documents filed November 4, 1988 by WWOR at 26 ¶ 41. The motion expressly sought documents within the custody of Garden State's attorneys. *Id.* at 16 ¶ 13. It also expressly provided that the document requests were continuing in character.[15] *Id.* at 17 ¶ 17. The ALJ granted the relevant document request. *WWOR, Inc.*, FCC 88M-4056 (Nov. 28, 1988) at 6. Garden State's failure to produce the documents from its law firm's records in response to this request directly contributed to the ALJ's original inability to fix the date of the dinner meeting.

51. Garden State has shown no justification for its continued failure to produce documentation from Cohen and Berfield's files responsive to the document request. We reject the idea that Garden State's failure to disclose evidence establishing the date of the dinner meeting earlier can be justified because Garden State supposedly did not appreciate the significance of the information involved.[16] (Indeed, Cohen admitted that Wells searched her records in response to the document request. Tr. 2243.)

52. Garden State certainly knew that the date of the dinner meeting was significant. Cohen admitted that inquiry had been made during the course of discovery as to the date of the dinner meeting. Tr. 2242. Indeed, Cohen stated during his original testimony that he anticipated

that the ALJ would want to know the dates of the pertinent discussions. Tr. 1437. He even complained during cross examination that documents were not made available to help refresh his memory and undertook to further consult his diary in an attempt to reconstruct the date of the dinner meeting. Tr. 1435, 1441-42.

53. Later in the proceeding, Garden State received additional notice of its continuing need to produce the relevant documents. In its proposed findings at the original hearing, the Bureau specifically argued that establishing the dates was material and explicitly questioned Garden State's failure to consult business records to establish the dates. *Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law* filed December 19, 1990 at 31-32 ¶ 3. Although the ALJ, like the Bureau, originally recommended grant of the settlement, he called the dispute over the dates "material" and the failure to establish the dates "troubling." 6 FCC Rcd at 137-38 ¶ 55.

54. The foregoing demonstrates that Garden State deliberately avoided producing documents responsive to a continuing discovery request, although Garden State was specifically on notice that the documents involved were material and had been explicitly reminded that relevant documents could presumably be found in its attorney's files. In this regard, the record indicates that Cohen shared the Bureau's expectation that relevant documents probably were at hand in the law firm's files. Thus, Cohen knew that information of the type ultimately produced was made part of his firm's records in the ordinary course of business. Cohen testified that he routinely made notations of the details of business expenses on the pertinent receipts and then submitted them to clerical personnel to be posted to a ledger entry. Tr. 2235-36. When Cohen wished to obtain the relevant records, he only had to ask a secretary to retrieve them, which she did within a few days. Tr. 2229, 2231, 2234. That Cohen had a strong expectation that the sought after evidence was readily available is illustrated by his testimony that he "could not understand it" when his secretary did not also recover a hotel receipt -- until he was reminded that he stayed with the Fetners, not at a hotel. Tr. 2239.

55. As our earlier discussion indicates, we find the evidence ultimately produced highly significant in resolving the abuse of process issue. We cannot condone an applicant's decision to conceal such evidence. *See RKO, supra.*[17] We find this conduct inherently deceptive and a further basis to deny Garden State's application.

V. BIFURCATION OF PROCEEDING

56. *Remand order.* When the ALJ added the abuse of process issue against Garden State, he did so in the context of considering whether to approve the parties' settlement. In our remand order, however, we noted that resolution of this issue might also be relevant to Garden State's qualifications to be a Commission licensee. We stated that if the ALJ found disqualifying abuse of process, it would be appropriate for him to deny Garden State's application without further hearings. 6 FCC Rcd at 1526 n.21. Because of the special circumstances here, we made an exception to our usual practice of not bifurcating proceedings to dispose of only some of the issues. *See RKO General, Inc. (WOR-TV),* 61 FCC 2d 1062, 1063-64 ¶ 4 (1976).

57. *Exceptions and Motion for Remand.* In its exceptions, Garden State contends that separate resolution of the abuse of process issue abridges its right to a full and fair hearing. In its motion for remand, Garden State further elaborates its argument that the resolution of the issues should not be bifurcated. Garden State, notes that, on September 3, 1991, WWOR terminated the settlement pursuant to a provision of the agreement giving it that right. Thus, because there is no longer a pending settlement and in light of its argument that piecemeal resolution of the issues is inappropriate, Garden State asserts that the proceeding should now be remanded for a full hearing on all aspects of the parties' basic and comparative qualifications.

58. Garden State argues that separate consideration of a renewal challenger's qualifications creates an undue pressure to disqualify the challenger, thereby abridging the challenger's hearing rights. Garden State asserts that the Commission's established policy is consistent with this reality. Garden State also argues that its qualifications cannot now be considered because it did not have a full opportunity to address the issues on remand,[18] and the Commission does not have a full record before it on the remanded issues. Garden State submits that, in light of the infirmities that it has noted, the ALJ has demonstrated that he does not have the minimal qualifications as a trier of fact and that any further hearings should be before a new ALJ.

59. *Responsive pleadings.* WWOR and the Bureau respond that further hearings are unnecessary and that they would cause wasteful delay. They contend that there is no legal bar to bifurcating a proceeding and the record here as to the remanded issues is complete. These parties further contend that the termination of the settlement does not moot the finding that Garden State committed a disqualifying abuse of process.

60. *Discussion.* We find no impropriety in considering Garden State's qualifications on a bifurcated basis. The Commission has the discretion to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. 47 U.S.C. § 4(j). Ordinarily the Commission, as a matter of policy, discourages bifurcating cases because of the danger that such a procedure will create a multiplicity of appeals or remands. *RKO General, Inc. (WOR - TV),* 61 FCC 2d at 1063-64 ¶¶ 4-5. Here, however, as in *RKO,* ample circumstances exist to make an exception to that policy. *Id.* at 1064-65 ¶ 6. The pendency of the settlement agreement constituted a sound reason to immediately resolve the question of the *bona fides* of Garden State's application, which also bore on Garden State's basic qualifications, since it involved a potential abuse of process. Because resolution of the abuse of process issue moots all other aspects of this proceeding, conducting further lengthy hearings on such matters would merely cause delay and waste administrative resources.

61. This procedure does not abridge Garden State's right to due process. *RKO,* 61 FCC 2d at 1065 n.4. Although the court has not hesitated to set aside Commission actions in which it found that challengers have been improvidently disqualified, the court has given no indication that disqualifying the challenger in a bifurcated hearing was improper where the record adequately supported this action. *See, e.g., Multi-State Communications, Inc. v. FCC,* 590 F.2d 1117, 1118 n.2 (D.C. Cir. 1978). As our discussion above indicates, Garden State had a full op-

portunity here to develop a record on the remanded issues and to argue its case. Garden State does not point to any specific respect in which the record concerning the abuse of process or lack of candor questions would have to be supplemented to provide an adequate basis for a decision.[19]

VI. WWOR'S QUALIFICATIONS

62. *First Petition to Enlarge Issues.* Garden State asserts that an issue should be designated to determine whether WWOR made misrepresentations, lacked candor, or abused the Commission's processes by taking inconsistent positions on the merits of this case. These allegations relate to pleadings filed by WWOR after it entered into the settlement agreement with Garden State. Garden State observes that after the original hearings before the ALJ, WWOR filed proposed findings and conclusions recommending that "there is no direct and conclusive evidence that Garden State filed for the purpose of obtaining a settlement." Similarly, after the Commission remanded the issue for further hearings (WWOR having filed no exceptions to the ALJ's partial initial decision), WWOR again supported the *bona fides* of Garden State's application and recommended approval of the settlement agreement.

63. Garden State points out that, after the ALJ issued his adverse initial decision on remand, however, WWOR changed its position. WWOR exercised its option under the agreement to terminate the settlement (a right all of the parties had if the Commission had not finally approved the settlement by September 1, 1991[20]). WWOR then filed a Motion for Expedited Review in which it asserted that the adverse conclusions in the initial decision on remand were fully supported by the record. Garden State maintains that WWOR's inconsistent positions raise the question of whether WWOR misrepresented its true view of the record as a matter of litigation tactics. Garden State urges that, if so, WWOR lacked candor and abused the Commission's processes. Garden State asserts that WWOR's change in position is particularly objectionable, since, during the hearing, the ALJ attempted to definitively ascertain WWOR's views by questioning Robert D. Hadl, the officer who signed the settlement on behalf of WWOR and MCA, as to whether he believed that Garden State had filed its application in good faith. Tr. 1088 et seq.; WWOR Exh. 21-B, Exh. B. Garden State characterizes WWOR's Motion for Expedited Review as an attempt to file an untimely brief in support of the initial decision on remand. Garden State maintains that WWOR has already exhibited a pattern of filing abusive pleadings, which is reflected in several petitions to enlarge issues that the ALJ previously denied in this proceeding.

64. *Oppositions.* WWOR denies that it took inconsistent positions on the abuse of process issue. Rather, WWOR explains that it merely commented in a limited way on the state of the existing record and did not draw any final conclusions on the merits of the issue. Thus, WWOR claims that its statments were not contradictory. The Bureau agrees that WWOR made no false statements of material fact and exhibited no intent to conceal. As to the alleged pattern of abusive conduct claimed by Garden State, WWOR observes that the ALJ consistently ruled in WWOR's favor as to these matters. The Bureau asserts that WWOR's motion was not untimely because it was filed on the date for responding to Garden State's exceptions.

65. *Discussion.* We find that Garden State has made no *prima facie* showing that WWOR abused the Commission's processes or lacked candor before the Commission. We recognize that, once WWOR entered into a settlement with Garden State, the relationship between these two parties was no longer adversarial. *Cf. Brocklesby v. United States*, 767 F.2d 1288, 1292-93 (9th Cir. 1985) (under the Federal Rules of Evidence, a settlement is admissible to show the then non-adversarial relationship of parties). Thus, it is not surprising that WWOR's statements concerning Garden State's culpability were circumspect.

66. We find no evidence that WWOR made false or misleading statements of material fact in maintaining its non-adverarial posture or that it contradicted itself in material respects. Hadl's testimony, for example, reaffirms that WWOR filed its petition to enlarge issues against Garden State with a good faith belief that Garden State abused the Commission's processes (based on the circumstantial evidence set forth in the petition). Tr. 1171-72. Hadl gave no indication that WWOR had changed its views with regard to the relevance of the circumstantial evidence, in urging approval of the settlement, but merely stated that he had been advised by counsel that "based on the state of the record at the moment, there is no direct and conclusive evidence [of abuse of process]." Tr. 1173. WWOR adopted a similar position in its original proposed findings of fact and conclusions of law. *See WWOR-TV's Proposed Findings of Fact and Conclusions of Law* filed December 13, 1990 at 20-22 ¶¶ 8-10. In its submission following the remand hearing, WWOR offered no conclusions of law as to Garden State's ultimate culpability, a fact that the ALJ recognized. 6 FCC Rcd at 4352 ¶ 10.

67. After WWOR terminated the settlement, consistent with the terms of that agreement, WWOR reverted to an adversarial position. The statement in WWOR's Motion for Expedited Review (at 2) that the ALJ's conclusions after remand are "fully supported by the substantial new evidence" does not materially contradict its previous characterizations of the record, which refrained from drawing any conclusions about the significance of the new evidence. Thus, we find no evidence of any matter warranting further consideration.[21]

68. *Second Petition to Enlarge Issues.* In its second petition to enlarge issues, Garden State contends that WWOR's actions in this proceeding reveal that WWOR: (1) made misrepresentations with respect to another matter before the Commission and (2) is in violation of the Communications Act. Garden State observes that, on December 26, 1990, the Commission approved the transfer of WWOR from MCA to a new corporation now called Pinelands, Inc. (Pinelands), which is owned by the former stockholders of MCA. *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990), *recon. denied*, FCC 91-347 (Nov. 13, 1991). This transfer was necessitated by the acquisition of MCA by the Japanese company, Matsushita Electrical Industrial Company, Ltd. (Matsushita), since control of a broadcast station by a foreign corporation is prohibited by 47 U.S.C. § 310(b).

69. Garden State alleges that the circumstances surrounding the joint termination of the settlement agreement by WWOR and MCA reveal that MCA continues to control Pinelands, contrary to representations made to the

Commission and to 47 U.S.C. § 310(b). Garden State points out that Hadl, who signed the termination notice on behalf of MCA (but not WWOR), is both an officer of MCA and a director of Pinelands. According to Garden State, the notice was written on MCA stationery but delivered in an envelope from WWOR-TV's law firm. Garden State further alleges that MCA had undertaken to pay WWOR's liability under the settlement and that termination of the settlement therefore benefitted MCA rather than WWOR (which would be obliged to participate in any further aspects of this proceeding).

70. As further evidence of MCA's control of Pinelands, Garden State alleges that Pineland's board of directors has delegated its authority to an executive committee consisting of present and former MCA officers. Additionally, Garden State alleges that Pinelands' has a "share purchase rights plan" and other "poison pill" provisions that make it difficult if not impossible for Pinelands' stockholders to alter the authority of directors chosen by MCA.

71. *Oppositions*. WWOR and the Bureau contend that Garden State has demonstrated no evidence of impropriety. They assert that there is nothing remarkable in the fact that WWOR and MCA jointly terminated the settlement agreement, since they entered into it jointly when WWOR was a wholly-owned subsidiary of MCA. WWOR and the Bureau characterize Garden States allegations regarding Pineland's board of directors and other corporate arrangements as a rehash of arguments already rejected by the Commission in approving the transfer of WWOR to Pinelands.

72. *Discussion*. We find that Garden State's second petition to enlarge issues makes no *prima facie* showing that WWOR misrepresented facts to the Commission or that MCA is exercising improper *de facto* control over WWOR. We have already considered and rejected Garden State's allegations concerning Pineland's board of directors and "poison pill" provisions in ruling on WWOR's transfer of control application. Garden State has not advanced any new information that would warrant a different result. Thus, in previously rejecting Garden State's allegations concerning Pinelands' board of directors, we noted that six of the eight directors would not have any connection with MCA after the proposed spin-off. 6 FCC Rcd at 201-02 ¶ 18. Although Garden State now observes that substantial authority will be delegated to a committee of three directors, two of the three likewise have no continuing relationship with MCA. The Commission also rejected Garden State's allegations that the "poison pill" provisions, which Pinelands then expected to adopt, were improper. *Id.* at 204 ¶ 21. We reject Garden State's assertion that the specifics of the provisions, as they were later adopted, demonstrate their improper nature. Rather, we find that these provisions are consistent with our understanding, when we approved the transfer, of what "poison pill" provisions typically involve.

73. Turning specifically to the termination of the settlement, we find nothing improper in the actions of MCA and WWOR, even assuming *arguendo* that they acted "collusively" for the benefit of MCA. As we pointed out elsewhere, when a company is spun-off, we do not require that the former subsidiary and its parent sever all existing contractual relationships. 6 FCC Rcd at 201 ¶ 16. Thus, the failure to do so does not necessarily portend the exercise of improper *de facto* control. Here, MCA and WWOR jointly entered into the settlement agreement as parent and subsidiary. WWOR Exh. 21-B, Exh. A at 1. In view of this preexisting joint contractual relationship, there is nothing unusual in WWOR and MCA mutually deciding how to deal with their joint rights and responsibilities under the agreement. *Cf.* 6 FCC Rcd at 203 ¶ 20 (MCA and WWOR not required to abrogate existing contracts upon approval of the spin-off). Garden State has shown no reason to find that the joint actions of WWOR and MCA in this regard provide any basis for an inference that MCA will exercise improper *de facto* control over WWOR in the future.

VII. ORDERS

74. ACCORDINGLY, IT IS ORDERED, That the Motion for Expedited Review filed August 26, 1991 by WWOR-TV, Inc. IS DISMISSED as moot.

75. IT IS FURTHER ORDERED, That the Motion to Strike filed September 26, 1991 by Garden State Broadcasting Limited Partnership IS DENIED.[22]

76. IT IS FURTHER ORDERED, That the Motion for Remand filed September 10, 1991 by Garden State Broadcasting Limited Partnership IS DENIED.

77. IT IS FURTHER ORDERED, That the Petitions to Enlarge Issues filed September 10, 1991 and September 18, 1991 by Garden State Broadcasting Limited Partnership ARE DENIED.

78. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement filed September 27, 1990 by WWOR-TV, Inc. and Garden State Broadcasting Limited Partnership IS DISMISSED as moot.

79. IT IS FURTHER ORDERED, That the application of WWOR-TV, Inc. for renewal of license (File No. BRCT-871221KE) IS GRANTED, and the application for Garden State Broadcasting Limited Partnership for a construction permit (File No. BPCT-871223KG) IS DENIED.

80. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Fetner died April 12, 1988. Tr. 2038.

[2] In its pleadings before us, Garden State renews its argument that the ALJ relied on speculation and therefore did not have adequate grounds to specify an issue. We agree with the ALJ, however, that the circumstances set forth in the ALJ's order raise a substantial question warranting the addition of an issue.

[3] Now before the Commission are: (1) Exceptions and Brief filed August 14, 1991 by Garden State, and the Mass Media Bureau's Reply to Exceptions and Brief filed August 26, 1991; (2) a Motion for Expedited Review filed August 26, 1991 by WWOR, and a Response to Motion for Expedited Review filed August 30, 1991 by Garden State; (3) a Motion for Remand filed September 10, 1991 by Garden State, and oppositions filed September 16, 1991 by the Bureau and September 19, 1991 by WWOR; (4) a Motion to Strike [WWOR's opposition] filed

September 26, 1991 by Garden State; (5) a Petition to Enlarge Issues filed September 10, 1991 by Garden State, oppositions filed September 19, 1991 by WWOR and September 20, 1991 by the Bureau, and a reply filed September 26, 1991 by Garden State; and (6) a Petition to Enlarge Issues filed September 18, 1991 by Garden State, oppositions filed September 30, 1991 by WWOR and the Bureau, and a reply filed October 7, 1991 by Garden State.

[4] The Commission also suggested that evidence as to Garden State's efforts to establish its financial qualifications might bear on the *bona fides* of its application. The ALJ made extensive findings as to this matter. 6 FCC Rcd at 4356-60 ¶¶ 22-43. Our examination of the ALJ's findings indicates that Garden State is correct in asserting that they bear primarily upon the question of Garden State's financial qualifications, rather than the abuse of process issue. Accordingly, we need not consider at this time whether, as Garden State claims, the record demonstrates that it took adequate measures to establish its financial qualifications. To the extent that Garden State might argue that its efforts to establish its financial qualifications demonstrates that it has vigorously prosecuted its application, we address the issue of vigorous prosecution at paragraph 43, below.

[5] As discussed at paragraph 47, below, this evidence consists of two credit card receipts for restaurant service and a plane ticket.

[6] Garden State also challenges several collateral findings by the ALJ. According to Garden State, these include: (1) an irrelevant finding that Cohen represented other renewal challengers that reached settlements in other proceedings (6 FCC Rcd at 4360 ¶ 44); (2) an erroneous finding that *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991) found that Cohen and Wells deceived the Commission in that proceeding (6 FCC Rcd at 4367 n.9); (3) an erroneous finding that the Commission found channel 9's programming meritorious in *RKO General, Inc. (WOR-TV)*, 1 FCC Rcd 1081 (1986) (6 FCC Rcd at 4362 ¶ 56); (4) an unsupported finding that Garden State's vigorous litigation was a settlement tactic (*Id.* at 4360 ¶ 45, 4361 ¶ 48); (5) an unsupported finding that Garden State engaged in settlement discussions prior to January 1990 (*Id.* at 4360 ¶ 44, 4381 ¶ 48); and (6) an unsupported finding that Garden State attempted to delay discovery as a settlement tactic (*Id.* at 4368 n.21). Our own analysis of the record does not rely on any of these questioned findings.

[7] Also for this reason, we wish to make clear that we have carried out a careful *de novo* review of the record. Thus, in the pages that follow, we endeavor to set out the evidentiary basis for our findings in great detail. We believe that this approach is especially appropriate here, since Garden State has repeatedly complained that the ALJ exhibited bias. *See, e.g., WWOR-TV, Inc.*, 5 FCC Rcd 2845 (1990). As a related matter, Garden State has objected to the further involvement in the resolution of this case of a Commission employee, whom Garden State accused of improper conduct. *See Petition for Investigation*, 6 FCC Rcd 4762 ¶ 1 (1991). Although we discerned no impropriety in the employee's conduct, we note that the employee in question has not participated in the preparation of this decision.

[8] Wells, however, attributed her awareness of WWOR's need to file for license renewal to Cohen. Tr. 1836-37.

[9] Garden State's own testimony establishes that the inception of Garden State's challenge occurred at the dinner meeting involving Fetner, Wells, and Cohen. At this meeting, Fetner proposed to Wells that she accept an interest in a limited partnership to seek channel 9. *See* tr. 1448-49, 1741, 1746.

[10] Thus, we find no basis for Garden State's claim that Wells' desire to operate channel 9 was the reason for the challenge. Rather, the record indicates that Fetner and Cohen supplied the initiative in mounting the challenge, beginning with hosting the April 30 meeting.

[11] As corrected by *WWOR-TV, Inc.*, 90M-3943 (Dec. 13, 1990).

[12] For example, when the ALJ in his partial initial decision found that Garden State had vigorously litigated its application, he relied mainly on motions that Garden State filed in contesting the abuse of process issue and not the standard comparative issue. *See* 6 FCC Rcd at 136-37 ¶ 50, 141 n.13.

[13] Garden State also asserts that the ALJ exceeded the scope of the remand order, which refers only to the abuse of process issue, by considering this additional issue. Given our intention that matters related to the abuse of process issue be thoroughly explored, we ratify the ALJ's action. In this regard, we agree with the ALJ that the circumstances surrounding the disclosure of the meeting date and the date's crucial significance to the abuse of process issue warrant the addition of an issue. We note that the ALJ's designation of a specific issue gave Garden State the necessary notice and opportunity to be heard on this matter.

[14] Cohen suggested that he might have discussed channel 9 with Wells during a discussion occasioned by the filing, in April 1987, of two other broadcast applications in which she was involved. Tr. 1431.

[15] This provision of the motion is consistent with the practice of the federal courts, which requires parties to supplement discovery responses known to be inaccurate or incomplete. *See Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir. 1975); Fed.R.Civ.Pro. 26(e)(2)(B). It is also consistent with 47 C.F.R. § 1.65, which requires applicants to report changes as to any matters that may be of decisional significance.

[16] On remand, Cohen explained that he had made no attempt to obtain records from his firm during discovery because: "At no time during the discovery process was it suggested that a search of our firm's records be made for business records that might reflect the exact date of the dinner meeting nor did it ever occur to me to do so because no other parties had evidenced a belief that the precise date was significant." Garden State Exh. 12 at 2-3. *See also* tr. 2242-43. We find this explanation unconvincing. As previously noted, contrary to Cohen's assertion, the document request specifically referred to documents within the custody of Garden State's attorneys. As to the significance of the precise date of the meeting, *see* paragraphs 54-55, below.

[17] We note that RKO was disqualified despite its attempt to attribute to counsel the response found lacking in candor.

[18] Specifically, Garden State complains that it had no notice that the ALJ would resolve the substance of the financial qualifications issues against Garden State. As previously noted, our decision does not rely on these matters.

[19] Thus, contrary to Garden State's contention, the proceedings conducted on remand fully accord with our expectations expressed in remanding this case. *See* 6 FCC Rcd at 4878 n.1.

[20] *See* WWOR Exh. 21-B, Exh. A at 4 ¶ 6.

[21] Garden State has made no specific showing either individually or cumulatively that would warrant overturning earlier rulings by the ALJ declining to add other issues against WWOR. Accordingly, we have no basis to find that WWOR has exhibited a pattern of abusive conduct or that the ALJ has shown bias by ignoring that supposed pattern of conduct.

[22] Garden State asserts that WWOR filed its opposition to Garden State's motion for remand three days late. However, consideration of WWOR's opposition will neither cause delay nor prejudice Garden State.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

LONGVIEW CABLE TELEVISION CO., INC. CSR-3216

AND

KILGORE CABLE TELEVISION CO.

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1992; Released: January 22, 1992

By the Commission:

INTRODUCTION

1. Before the Commission is an application for review of the decision of the Chief, Video Services Division, Mass Media Bureau, in *Longview Cable Television Co., Inc. and Kilgore Cable Television Co.*, Cable Television Actions Report No. 3265 (released March 6, 1990), filed by Longview Cable Television Co., Inc. and Kilgore Cable Television Co. (hereinafter "Petitioners"), serving Longview and Kilgore, Texas. By that decision, the Mass Media Bureau denied Petitioners' request for reinstatement and grant *nunc pro tunc* of their prior petition for special relief, CSR-1866, which had been dismissed as moot nearly eight years prior to Petitioners' request for reinstatement.[1]

2. Among the rules governing the provision of cable television service adopted by the Commission in 1972 were rules limiting the number of distant television broadcast signals a cable system could import for carriage into its local market.[2] The specifics of the rules varied according to the size of the television market in which a cable system was located. Both Longview and Kilgore, Texas, where Petitioners' cable systems operate, are located within the Tyler-Longview, Texas smaller television market (#123), to which no local independent station is or has been licensed. Therefore, during the 1970's, Petitioner's signal complements were, in accordance with §76.59 of the Commission's Rules, limited to a single imported independent station, in terms of the number of commercial independent stations the systems could carry. Both systems carried the signal of Station KTVT (Ind., Channel 11), Fort Worth, Texas, imported via common carrier microwave.

3. In 1978, a separate cable system in the Tyler, Texas market,[3] Television Cable Services, Inc. (hereinafter "TCS"), serving Tyler and Jacksonville, Texas, filed for a waiver of §76.59 of the Rules to enable it to carry the signals of three distant independent stations,[4] in addition to that of KTVT. Pursuant to Commission procedures applicable at that time,[5] TCS submitted a market-wide cumulative impact analysis demonstrating that, even if every cable television system in the market were authorized to carry the additional signals in question, the expected impact on the local market broadcaster, Station KLTV (ABC, Channel 7), Tyler, Texas, would not likely impair the station's ability to serve the public interest. In view of this analysis, the Commission granted TCS' requested waiver of the distant signal limitation rules. The waiver became effective twenty days later when no further opposition was filed. Shortly thereafter, the Commission repealed and deleted the distant signal limitation rules.[6] Though this action was stayed by the appellate court, it was ultimately upheld.[7]

4. Four months after the Commission repealed the distant signal limitation rules, but during the pendency of the court-ordered stay, Petitioners sought a Commission waiver of those rules for their own systems in the Tyler, Texas market to enable them to carry the additional signals of WGN-TV and WTBS. While the petition was pending, the appellate court upheld the Commission's deletion of its rules and lifted the stay.[8] Consequently, the Commission dismissed as moot all pending petitions for waiver of the former distant signal limitation rules, including that of Petitioners.[9]

5. Almost eight years later, in May 1989, Petitioners sought reinstatement and grant *nunc pro tunc* of their dismissed petition, based upon the Commission's grant of TCS' waiver request. Petitioners argued that, because the Commission had already found that no undue economic harm would befall the local market television broadcast station[10] even if every cable system in the market --including Petitioners' -- were to carry the signals in question, grant should have been forthcoming from the Commission. Petitioners noted in this regard that KLTV had not opposed their waiver request. In addition, Petitioners claimed that failure to grant the request has caused higher copyright fees to be imposed upon Petitioners for their carriage of additional distant signals. The Copyright Office has ruled that, absent an FCC-granted waiver, it must apply the higher fee for carriage of a distant signal; it has also held that the Copyright Royalty Tribunal lacks authority to waive this standard.[11] Petitioners pledged to lower subscriber rates to reflect any lowered copyright fees, and argued on equitable and public interest grounds that *nunc pro tunc* relief was necessary and appropriate.

6. The Mass Media Bureau disagreed, noting that Petitioners' request was untimely; that a new, updated marketplace analysis would be needed to assess the validity of Petitioners' request, which would be an inappropriate allocation of scarce Commission resources in the absence of underlying rules; and that the copyright rules were based upon different predicates than were the Commission's carriage rules, thereby making the Commission an inappropriate forum. Petitioners seek review of this decision.

SUMMARY OF APPLICATION FOR REVIEW

7. In support of their application for review, Petitioners argue that the Mass Media Bureau's ruling denying their reinstatement request is neither dictated nor supported by Commission precedent. Petitioners deny that their request is untimely, noting that the Copyright Office and the Copyright Royalty Tribunal did not articulate their position that Petitioners needed a prior Commission waiver until 1984. Nor, contend Petitioners, is a new or different analysis of the Tyler, Texas market necessary today. The

necessary analysis has already been performed, they state, and the Commission has found that it did not demonstrate any significant harmful impact on the local TV station. *See Television Cable Service, Inc., supra.* Petitioners are already carrying WGN-TV and WTBS -- and paying the higher royalty rates -- and no station has petitioned to require Petitioners to drop the signals. Indeed, KLTV, the Tyler, Texas station, had consented to Petitioners' 1981 waiver request. Petitioners contend, therefore, that but for the Commission's dismissal of their 1981 petition, Petitioners would have received the necessary Commission authorization to carry WGN-TV and WTBS by waiver.

8. Petitioners do not dispute the validity of the Commission's determination to dismiss as moot all pending petitions for waiver of the distant signal limitation rules upon the rules' deletion, insofar as the question of impact to local broadcasters is concerned. However, state Petitioners, it is now evident that the Commission's decision has had unintended copyright consequences for Petitioners. This result should not prevent the Commission from acting, maintain Petitioners, for the Commission has routinely examined and acted upon petitions to determine stations' significantly viewed status, and those petitions affect primarily, if not exclusively, copyright issues. Moreover, Petitioners note, both the Copyright Office and the Copyright Royalty Tribunal concluded in 1984, when approached by Petitioners and others, that a prior Commission waiver was necessary to qualify for reduced royalty rates. Petitioners further state that both the Copyright Office and the Copyright Royalty Tribunal -- while sympathetic to Petitioners' situation -- lacked statutory authority to waive the requirement.[12] Grant of *nunc pro tunc* relief, Petitioners maintain, would enable them to contend before the Copyright Office and the Copyright Royalty Tribunal that a basis exists for applying reduced royalty rates to Petitioners' carriage of WGN-TV and WTBS. Given the Commission's contribution -- however inadvertent -- to their dilemma, Petitioners claim that the Commission should "assume some obligation to attempt to rectify it." Accordingly, Petitioners urge the Commission to review and reverse the Mass Media Bureau's decision.

DISCUSSION

9. We affirm the decision of the Mass Media Bureau for the reasons stated therein. The underlying petition essentially requested that we reconsider an action taken eight years ago[13] and waive a rule that no longer exists for the sole purpose of working a change in copyright payment obligations. The original request for waiver of these rules was properly dismissed, and the time for seeking reconsideration of that action has long since passed. If we were to grant *nunc pro tunc* relief as requested, we could as well combine the waiver processes in place prior to 1980, with the policy decision to delete the rules in 1980, and treat all signal carriage beyond the now abolished rules as effectively permitted by waiver *nunc pro tunc* based upon a Commission finding of lack of impact. The Commission's decision abolishing its distant signal importation rules was based upon a general finding that cable carriage of distant signals did not adversely impact local television stations. Consequently, any like finding now with regard to the Longview-Kilgore market would not be unique to this market or the specific cable systems therein. Moreover, the Commission has no basis on which to judge, in the circumstances here presented, if a higher or a lower copyright payment would benefit the public. Nor is it the Commission's responsibility to make such a determination.[14] Finally, although Petitioners maintain that we should entertain their waiver request because we entertain requests for significantly viewed status in order to help stations achieve copyright-related goals, we note that our rules regarding significant viewing continue to exist and serve independent purposes under our syndicated exclusivity and network nonduplication rules, whereas our distant signal rules have long been repealed.

10. In view of the foregoing, we believe that the decision of the Mass Media Bureau in *Longview Cable Television Co., Inc. and Kilgore Cable Television Co.*, Cable Television Actions Report No. 3265 (released March 6, 1990), should be affirmed.

11. Accordingly, IT IS ORDERED, That the application for review (CSR-3216) filed by Longview Cable Television Co., Inc. and Kilgore Cable Television Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *American Video Corporation*, Mimeo No. 001895 (released July 2, 1981).

[2] These rules were embodied in former §§76.57, 76.59, 76.61, and 76.63 of the Commission's Rules.

[3] Prior to 1982, when a construction permit was granted to Station KLMG-TV (CBS, Channel 51), Longview, Texas, the market in question was the Tyler, Texas smaller television market (#157).

[4] These signals were Stations WGN-TV (Ind., Channel 9), Chicago, Illinois; WTBS (Ind., Channel 17), Atlanta, Georgia; and KTVU (Ind., Channel 2), Oakland, California.

[5] *See Arlington Telecommunications Corporation d/b/a ARTEC*, 69 FCC 2d 1923 (1978), *aff'd on recon.*, 70 FCC 2d 2291 (1979).

[6] *Report and Order in Dockets* Nos. 20988 and 21284, 79 FCC 2d 663 (1980).

[7] *Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[8] *Malrite TV of New York, Inc. v. FCC, supra.*

[9] *American Video Corporation, supra.*

[10] *Television Cable Service, Inc., supra.*

[11] *Compulsory License for Cable Systems*, 49 FR 14944, 14947, 14952-53 (1984).

[12] *Compulsory License for Cable Systems, supra.*

[13] Petitioners also waited five years to file for reinstatement before the Commission after the release of the 1984 Copyright Office and Copyright Royalty Tribunal's decision.

[14] It is also not clear that the action requested would achieve the intended result since the Copyright Office regulation in question clearly states: "To qualify as an FCC-permitted signal on the grounds of individual waiver of the FCC rules [47 CFR 76.7 in effect on June 24, 1981] the waiver must have actually been granted by the FCC. . . ." 37 CFR §201.17(h)(6).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-441

In the Matter of

Amendment of Section 73.606(b),	RM-6813
Table of Allotments,	
TV Broadcast Stations.	
(Calipatria, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1992; Released: January 22, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7477 (1989), issued in response to a petition filed on behalf of Calipatria Television ("petitioner"), proposing the allotment of UHF television Channel 54 to Calipatria, California, as that community's first local television broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. Calipatria (population 2,636),[1] in Imperial County (population 92,110), is located in southern California, approximately 275 kilometers (170 miles) southeast of Los Angeles.

3. We believe the public interest would be served by allotting Channel 54 to Calipatria, as that community's first local television broadcast service. As indicated in the *Notice*, Channel 54 can be allotted to Calipatria consistent with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is located at least 17.9 kilometers (11.2 miles) east[2] of the community to avoid a short-spacing to the co-channel allotment at Avalon, California.[3] Additionally, as Calipatria is located within 320 kilometers (199 miles) of the Mexico border, concurrence of the Mexican government to this proposal was obtained.

4. Although the Commission has imposed a freeze on television allotments or applications therefor in certain metropolitan areas pending the outcome of an inquiry into the uses of advanced television systems in broadcasting, Calipatria is not in one of the affected areas.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Calipatria, California	54

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] Population figures were taken from the 1980 U.S. Census.

[2] Coordinates used for Channel 54 at Calipatria are 33-04-37 and 115-19-46.

[3] Coordinates for Channel 54+ at Avalon, California, are 33-20-30 and 118-19-30.

[4] *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987), and *Order*, 52 FR 28346, July 29, 1987. The closest market to Calipatria listed in the *Order, supra*, is Los Angeles, which is located 291.3 kilometers (181 miles) from the restricted site specified above for Channel 54. A transmitter must be located a minimum distance of 280.8 kilometers (174.5 miles) from Los Angeles to be outside of that community's freeze area.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-277

In the Matter of

Amendment of Section 73.202(b), RM-7810
Table of Allotments,
FM Broadcast Stations.
(Oxford, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 22, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5566 (1991), proposing the substitution of FM Channel 229C3 for Channel 229A at Oxford, Mississippi, and modification of the license for Station WKLJ-FM to specify operation on Channel 229C3.[1] The *Notice* was issued in response to a petition filed by Oxford Radio, Inc. ("petitioner"), licensee of Station WKLJ-FM. Petitioner filed comments reiterating its interest in Channel 229C3 at Oxford.

2. We believe the public interest would be served by substituting Channel 229C3 for Channel 229A at Oxford, in order to provide the community with an additional wide coverage area station. Channel 229C3 can be allotted to Oxford, Mississippi, at petitioner's specified site, in compliance with the Commission's spacing requirements.[2] We shall authorize a modification of petitioner's license for Station WKLJ-FM, Oxford, to specify operation on Channel 229C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Oxford, Mississippi	229C3, 238A, 248C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WKLJ-FM, IS MODIFIED to specify operation on Channel 229C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Oxford Radio, Inc., licensee of Station WKLJ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The license for Station WKLJ-FM, Oxford, was modified to specify operation on Channel 229A in lieu of Channel 296A in MM Docket No. 91-6, effective July 25, 1991. *See* 6 FCC Rcd 3466 (1991).

[2] The coordinates for Channel 229C3 at Oxford are 34-20-05 and 89-43-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-274

In the Matter of

Amendment of Section 73.202(b),	RM-7802
Table of Allotments,	
FM Broadcast Stations.	
(Piedmont, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 22, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5557 (1991), proposing the substitution of FM Channel 285C3 for Channel 285A at Piedmont, Missouri, and modification of the license for Station KPWB-FM to specify operation on Channel 285C3. The *Notice* was issued in response to a petition filed by Hunt Broadcasting Group, Inc. ("petitioner"), licensee of Station KPWB-FM. Petitioner filed comments reiterating its interest in Channel 285C3 at Piedmont.

2. We believe the public interest would be served by substituting Channel 285C3 for Channel 285A at Piedmont, Missouri, in order to provide the community with a wide coverage area station. Channel 285C3 can be allotted to Piedmont, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 13.1 kilometers (8.1 miles) northwest of the community.[1] The grant of a license for Channel 285C3 at Piedmont may, however, be contingent on the licensing of Station KDXY, Paragould, Arkansas. Station KDXY, Paragould, was modified effective July 19, 1991, to specify operation on Channel 285C3 and to change its community of license from Paragrould to Lake City, Arkansas, in MM Docket 90-321. *See* 6 FCC Rcd 3325 (1991). We will authorize a modification of petitioner's license for Station KPWB-FM, Piedmont, Missouri, to specify operation on Channel 285C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Piedmont, Missouri	285C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KPWB-FM, Piedmont, Missouri, IS MODIFIED to specify operation on Channel 285C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by certified mail, return receipt requested, a copy of this order to the following:

North Arkansas Radio Co., Inc.
P.O. Box 1106
Paragould, Arkansas 72451
(licensee of Station KDXY)

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Hunt Broadcasting Group, Inc., licensee of Station KPWB-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 285C3 at Piedmont are 37-13-32 and 90-48-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-110

In the Matter of

Amendment of Section 73.202(b), RM-7678
Table of Allotments,
FM Broadcast Stations.
(Milford and Hastings, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 22, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Bott Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2053 (1991), proposing the reallotment of Channel 251C from Hastings to Milford, Nebraska, and the modification of Station KUHG(FM)'s construction permit to specify Milford as its community of license. Petitioner filed comments reiterating its intention to apply for the channel, if allotted to Milford. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 251C from Hastings to Milford. Milford is a community of 2,108 persons and presently has no local aural service. Further, while Hastings is larger in population with 23,045 persons, the community would continue to receive local aural commercial transmission service from one FM and two AM stations as well as noncommercial educational service from two FM stations. Finally, neither Hastings nor Milford is located in an Urbanized Area.

3. Channel 251C can be allotted to Milford in compliance with the Commission's minimum distance separation requirements with a site restriction of 46.5 kilometers (28.9 miles) west to accommodate petitioner's desired transmitter site.[1] In addition, use of the channel must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Commission's Rules regarding protection to the Commission's monitoring station at Grand Island, Nebraska. As proposed, and in accordance with Section 1.420(i) of the Commission's Rules, we will modify petitioner's construction permit for Station KUHG(FM) to specify operation on Channel 251C at Milford in lieu of its presently licensed community of Hastings.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hastings, Nebraska	268C2
Milford, Nebraska	251C

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Bott Communications, Inc., for Station KUHG(FM), Channel 251C, Hastings, Nebraska, IS MODIFIED to specify Milford, Nebraska, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Bott Communications, Inc., permittee of Station KUHG(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251C at Milford are North Latitude 40-48-00 and West Longitude 97-36-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-7

In the Matter of

Amendment of Section 73.202(b), RM-7879
Table of Allotments,
FM Broadcast Stations.
(Scotland Neck and Pinetops,
North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 13, 1992; Released: January 22, 1992

Comment Date: March 16, 1992
Reply Comment Date: March 31, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WYAL Radio, Inc. ("petitioner"), requesting the substitution of Channel 238C3 for Channel 238A at Scotland Neck, North Carolina, the reallotment of Channel 238C3 to Pinetops, North Carolina, as the community's first local aural transmission service, and the modification of Station WWRT(FM)'s construction permit to specify Pinetops as the station's community of license. Petitioner states that it will apply for the channel, if allotted to Pinetops.

2. Petitioner states that Pinetops is deserving of its first local aural transmission service. It notes that Pinetops has a 1980 U.S. Census population of 1,581 persons, is incorporated, and has its own local government. Pinetops also has its own police department, rescue squad, post office, public schools, library and community center. In addition, the community is served by approximately ten churches, including the Pinetops Baptist Church, Pinetops Presbyterian Church and Pinetops United Methodist Church, as well as approximately 50 businesses and three manufacturing plants. If petitioner's request is granted, it states that Scotland Neck (population 2,834 persons) will continue to receive local aural transmission service from Station WYAL-AM and reception service from WWRT(FM).

3. We believe the public interest would be served by seeking comments on the proposed substitution of Channel 238C3 for Channel 238A at Scotland Neck and its reallotment to Pinetops, North Carolina, since it could provide the community with its first local aural transmission service and permit Station WWRT(FM) to expand its coverage area. Further, the reallotment of Channel 238C3 to Pinetops will not deprive Scotland Neck of its sole local aural transmission service or result in the reallotment of a channel from a rural community to one within an urbanized area. Channel 238C3 can be allotted to Pinetops in compliance with the Commission's minimum distance separation requirements with a site restriction of 18 kilometers (11.1 miles) north to accommodate petitioner's desired transmitter site and avoid short-spacings to Station WRNS, Channel 236C, Kinston, North Carolina, and Station WKML, Channel 239C, Lumberton, North Carolina.[1] As requested, we also propose to modify petitioner's construction permit for Station WWRT(FM) to specify the higher class channel at the new community. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 238C3 at Pinetops or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pinetops, North Carolina	--	238C3
Scotland Neck, North Carolina	238A	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 16, 1992,** and reply comments on or before **March 31, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Daniel W. Clark, Esq.
Tharrington, Smith & Hargrove
P.O. Box 1151
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of*

[1] The coordinates for Channel 238C3 at Pinetops are North Latitude 35-55-54 and West Longitude 77-40-11.

the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-31

In the Matter of

Amendment of Section 73.202(b), RM-7535
Table of Allotments,
FM Broadcast Stations.
(Kershaw, South Carolina, and
Waxhaw, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 22, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Jeffrey C. Sigmon ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1286 (1991), proposing the substitution of Channel 291C3 for Channel 291A at Kershaw, South Carolina, the reallotment of Channel 291C3 from Kershaw to Waxhaw, North Carolina, and the modification of Station WLWN's construction permit (BPH-880324NK) to specify Waxhaw as the station's community of license. Petitioner filed comments reiterating his intention to apply for Channel 291C3, if allotted to Waxhaw. No other comments were received.

2. We believe the public interest would be served by substituting Channel 291C3 for Channel 291A and reallotting Channel 291C3 from Kershaw to Waxhaw. Petitioner has shown that the reallotment of Channel 291C3 to Waxhaw will result in a preferential arrangement of allotments. Waxhaw (population 1,208 persons) will receive its first local aural service and Kershaw (population 1,993 persons) will continue to receive local aural transmission service from AM Station WKSC.[1] In addition, the reallotment will not result in the relocation of a station from a rural to an urbanized area. Finally, the allotment of Channel 291C3 at Waxhaw is mutually exclusive with the present allotment of Channel 291A at Kershaw since the communities are located less than the required minimum distance separation of 142 kilometers (88.2 miles) for co-channel Class A and Class C3 allotments. Therefore, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the construction permit of Station WLWN to specify operation on Channel 291C3 at Waxhaw, North Carolina, in lieu of its present operation on Channel 291A at Kershaw, South Carolina.

3. Channel 291C3 can be allotted to Waxhaw in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.1 kilometers (6.9 miles) southeast to avoid short-spacings to Station WRDX, Channel 293C, Salisbury, North Carolina, and the pending application of Station WZLI, Channel 291C1, Toccoa, Georgia (BPH-900301IE), as well as to accommodate petitioner's desired transmitter site.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Waxhaw, North Carolina	291C3
Kershaw, South Carolina	–

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Jeffrey C. Sigmon for Station WLWN, IS MODIFIED to specify operation on Channel 291C3 at Waxhaw, North Carolina, in lieu of Channel 291A at Kershaw, South Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Jeffrey C. Sigmon, permittee of Station WLWN, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

---

[1] Population figures are taken from the 1980 U.S. Census.
[2] The coordinates for Channel 291C3 at Waxhaw are North Latitude 34-51-38 and West Longitude 80-39-03.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-279

In re Applications of

POUGHKEEPSIE BROADCASTING LIMITED	File No. BPH-870331OR
WICRAE EQUITIES LIMITED	File No. BPH-870414KH
POUGHKEEPSIE COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KT
THE KINNEY GROUP	File No. BPH-870415ME

For a Construction Permit
for a New FM Station on
Channel 241A in Poughkeepsie,
New York

ORDER

Adopted: January 2, 1992; Released: January 22, 1992

By the Commission:

I. BACKGROUND

1. Poughkeepsie Broadcasting Limited (PBL) seeks reconsideration of a Commission memorandum opinion and order denying review of a Review Board decision that denied PBL's application for a construction permit for a new FM radio station in Poughkeepsie, New York. *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991). The Board granted the mutually exclusive application of Wicrae Equities Limited. *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374 (Rev. Bd. 1990). *See also Poughkeepsie Broadcasting Limited*, 4 FCC Rcd 6543 (I.D. 1989).[1]

2. PBL is organized as a limited partnership. Its sole general partner, Steven Freeman, holds a 20 percent equity interest and would be integrated into management as the proposed station's general manager. PBL has three limited partners: Matthew Cooney (40 percent), Noel DeCordova (20 percent) and Peter DeCordova (20 percent). Cooney and the DeCordovas recruited Freeman as the general partner. 4 FCC Rcd at 6543-44 ¶¶ 6-8.

3. The Board affirmed the ALJ's denial of credit for Freeman's proposed integration. 5 FCC Rcd at 3376-78 ¶¶ 10-18. *See also* 4 FCC Rcd at 6544-45 ¶¶ 9-17, 6549-50 ¶¶ 55-63. The Board affirmed the ALJ's adverse findings regarding Freeman's credibility, finding that Freeman consistently exaggerated his role in the partnership and that he was unlikely to be a moving force in the applicant. According to the Board, the testimony regarding Freeman's role was contradictory and unreliable. In view of these deficiencies, the Board declined to credit Freeman's claim to be PBL'S controlling principal and, thus, rejected his claimed integration. Pursuant to 47 C.F.R. § 1.115(g), the Commission denied review of the Board's ruling without comment. 6 FCC Rcd at 2497 ¶ 1, 2498 ¶ 9.

II. DISCUSSION

4. In its petition for reconsideration, PBL complains that the Commission failed to discuss its arguments that it is entitled to 100 percent integration credit and PBL restates its arguments to that effect. As Wicrae correctly points out, PBL's petition for reconsideration is defective under the Commission's rules. Pursuant to 47 C.F.R. § 1.106(b)(2), the Commission will entertain a petition for reconsideration of an order denying an application for review only if:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

See also 47 C.F.R. 1.115(g). A petition for reconsideration which fails to rely on new facts or changed circumstances may be dismissed as repetitious. 47 C.F.R. 1.106(b)(3).

5. PBL's petition for reconsideration does not rely on new facts or changed circumstances. It essentially reiterates with minor variations the line of reasoning rejected by the Commission without comment in denying review. In so doing, the Commission found that the Board's decision amply justified rejecting PBL's integration proposal. PBL's petition for reconsideration will therefore be dismissed as repetitious.[2]

III. ORDER

6. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration filed June 10, 1991 by Poughkeepsie Broadcasting Limited IS DISMISSED as repetitious.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: a Petition for Reconsideration filed June 10, 1991 by Poughkeepsie Broadcasting Limited and an opposition filed June 25, 1991 Wicrae Equities Limited.

[2] We do, however, wish to comment on a matter relating to another applicant in this proceeding, Poughkeepsie Communications Limited Partnership (PCLP). In our prior memorandum opinion and order, we found that we could not rely on PCLP's nominal general partner, Thomas H. Cooper, to exercise exclusive control over the limited partnership. We therefore denied PCLP any credit for Cooper's proposed integration. Recently, in *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600-01 ¶ 12 (1991), we restated the considerations relevant to the evaluation of such proposals. We wish to make clear that our treatment of PCLP's proposal is consistent with the considerations set forth in *Evergreen*. We wish to note in particular that, although we discussed the facts concerning PCLP in chronological order rather than the order suggested in *Evergreen*, substantively our analysis is fully in accord with *Evergreen*. In *Evergreen*, we explained that we generally consider the principals' post-formation activities a better indicator of who will control the ongoing business than their pre-formation activities. 6 FCC Rcd at 5601 ¶ 16. However, we further explained that, where the post-formation record does not reliably demonstrate that the nominally active owners will exclusively control the ongoing business, we would look to both the pre- and post-formation records. *Id.* Here, we found that Cooper's post-formation activities did not reliably demonstrate his control of the applicant. *See* 6 FCC Rcd at 2498 ¶¶ 7-8. We therefore also considered the circumstances surrounding PCLP's formation. *See* 6 FCC Rcd at 2498 ¶ 6. In so doing we considered the pre-formation record regarding PCLP consistent with standards set forth in *Evergreen*, 6 FCC Rcd at 5600-01 ¶ 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: January 13, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tele-Communications, Inc. 4620-PP
4643 S. Ulster Street
Suite 600
Denver, Colorado 80237

In re: TCI Cablevision of Colorado
Boulder, Colorado
CO0006

Gentlemen:

This is a Notice of Apparent Liability for forfeiture issued pursuant to §503(b) of the Communications Act of 1934, as amended. TCI Cablevision of Colorado (hereinafter TCI) has incurred liability in the amount of twenty-three thousand, seven hundred fifty dollars ($23,750) based on the following apparent repeated violation of the Commission's Rules:

> Emission of radiation in excess of twenty (20) microvolts per meter measured at a distance of ten feet from the cable on January 22, 1991, and February 5, 1991, in violation of §76.605(a)(11) of the Commission's Rules.

Section 76.605(a)(11) of the Commission's Rules prohibits cable systems, operating in the 54-216 MHz band, from radiating in excess of 20 microvolts per meter at a distance of ten (10) feet from the cable. It is apparent from the severity and number of leaks found that TCI has extensive leakage problems (see Appendix I attached). Under the Commission's regulatory framework, a cable system's use of the spectrum is dependent upon its ability to control signal leakage. Cable operators transmit signals by coaxial cable and should not radiate signals in excess of the standards set out in the Commission's Rules. This allows cable television systems and authorized over-the-air users to use the same frequencies in the same area. To do so, systems must meet stringent Commission radiation standards to ensure that their use of frequencies in the coaxial cable will not interfere with proximate authorized over-the-air services. Where aeronautical frequencies are involved, the need for cable signal integrity is vital. The Commission has repeatedly expressed its concern over the danger that exists to life and property from cable systems, such as TCI's, that radiate excessively. *Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984); *recon. denied*, 100 FCC 2d 117 (1985); *Report and Order in Docket No. 21006*, 65 FCC 2d 813 (1977).

On January 22, 1991, and February 5, 1991, staff from the Commission's Field Operations Bureau at Denver, Colorado inspected TCI's cable system serving Boulder, Colorado. It was discovered that on both days the system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of §76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on January 22, 1991, it was also determined that the system's operation in such a manner constituted a threat to aeronautical communications. In this regard, the Commission has indicated that a cable system operating with an ambient signal leakage level exceeding the Cumulative Signal Leakage Index (CLI) criteria set forth in §76.611 of the Rules, as was TCI's system, endangers the functioning of the radionavigation service and aeronautical communications.[1] *See Second Report and Order in Docket No. 21006*, *supra*, at 524. Accordingly, TCI was directed by the Field Operations Bureau to cease operations in the frequency bands 108-137 MHz and 225-400 MHz, because such endangerment constituted harmful interference as defined by §76.613 of the Rules. TCI complied by curtailing service in the relevant frequency bands. On February 1, 1991, TCI was authorized by the Field Operations Bureau to resume normal operations, based upon TCI's corrective actions as demonstrated by a new CLI report. On February 5, 1991, Commission staff again inspected TCI's cable system and discovered signal leakage in violation of §76.605 of the Rules, but not at levels which exceeded the CLI standards.

Based upon the above facts, it appears that the TCI system has been radiating in excess of the Commission's standards and that this noncompliance threatened the Commission's regulatory goal of compatibility between the use of frequencies by cable television systems and various services in the same area. We note that TCI complied immediately with the staff's directive and has now eliminated the cited excessive signal leakage. However, such corrective action does not excuse TCI's initial failure to maintain the integrity of its cable distribution plant or relieve it of liability for such dereliction. In determining the amount of forfeiture, we are guided by our recently adopted *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *reconsideration pending*, which take into consideration the factors set forth in §503(b)(2) of the Communications Act of 1934, as amended. Under these standards, $12,500 per day is the based forfeiture for unauthorized signal emissions. Here, the leakage measured on the first day was severe and, in fact, exceeded the CLI criteria. In addition, serious leakage problems in violation of §76.605 were discovered on the second day of inspection. We find the level of the initial signal leakage violation to be a substantial aggravating factor, because of the serious threat to the public safety caused by such operation. *See TCI Cablevision of Maryland*, 6 FCC Rcd 6487 (1991). Consequently, because the violation was egregious, applying the standards, we are increasing the forfeiture to $23,750.

In regard to this forfeiture TCI may take any of the actions set forth in §1.80 of the Commission's Rules, as summarized in the attachment to this letter.

This letter was adopted by the Commission on January 6, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

APPENDIX I

TCI CABLEVISION OF COLORADO, INC.; BOULDER, CO

DATE	LOCATION	MICROVOLTS/ METER
1/22/91	Hotel Boulderado	1746
1/22/91	Between 355 & 395 17th Street	1428
1/22/91	Behind 1224 Mariposa Avenue	52
1/22/91	Alley between Grant Place & 9th Street off Cascade Avenue	68
1/22/91	40 S. 36th Street	137
1/22/91	1090 30th Street	135
2/05/91	SE corner of 17th & Arapahoe	136.9
2/05/91	Behind 1380 19th Street (behind apts.)	310.6

All measurements were made on 121.2625 MHz.

FOOTNOTE

[1] The provisions of §76.611 are applicable to all cable television systems which transmit carriers or other signal components carried at an average power level equal to or greater than 10^{-4} watts across a 25 MHz bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108-137 and 225-400 MHz for any purpose. TCI's signal use satisfies these conditions.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: January 13, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Triad Communications Company 4620-SP
305-C Church Street
Hastings, Michigan 49058

In re: Triad Communications Company
Hastings, Michigan
MI0151

Gentlemen:

This is a Notice of Apparent Liability for forfeiture issued pursuant to §503(b) of the Communications Act of 1934, as amended. Triad Communications Company (hereinafter Triad) has incurred liability in the amount of twenty-three thousand, seven hundred fifty dollars ($23,750) based on the following apparent repeated violation of the Commission's Rules:

> Emission of radiation in excess of twenty (20) microvolts per meter measured at a distance of ten feet from the cable on January 22, 1991, and February 28, 1991, in violation of §76.605(a)(11) of the Commission's Rules.

Section 76.605(a)(11) of the Commission's Rules prohibits cable systems, operating in the 54-216 MHz band, from radiating in excess of 20 microvolts per meter at a distance of ten (10) feet from the cable. It is apparent from the severity and number of leaks found that Triad has extensive leakage problems (see Appendix I attached). Under the Commission's regulatory framework, a cable system's use of the spectrum is dependent upon its ability to control signal leakage. Cable operators transmit signals by coaxial cable and should not radiate signals in excess of the standards set out in the Commission's Rules. This allows cable television systems and authorized over-the-air users to use the same frequencies in the same area. To do so, systems must meet stringent Commission radiation standards to ensure that their use of frequencies in the coaxial cable will not interfere with proximate authorized over-the-air services. Where aeronautical frequencies are involved, the need for cable signal integrity is vital. The Commission has repeatedly expressed its concern over the danger that exists to life and property from cable systems, such as Triad's, that radiate excessively. *Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984); *recon. denied*, 100 FCC 2d 117 (1985); *Report and Order in Docket No. 21006*, 65 FCC 2d 813 (1977).

On January 22, 1991 and on February 28, 1991, staff from the Commission's Field Operations Bureau at Allegan, Michigan inspected Triad's cable system serving Hastings, Michigan. It was discovered that on both days the system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of §76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on January 22, 1991, it was also determined that the system's operation in such a manner constituted a threat to aeronautical communications. In this regard, the Commission has indicated that a cable system operating with an ambient signal leakage level exceeding the Cumulative Signal Leakage Index (CLI) criteria set forth in §76.611 of the Rules, as was Triad's system, endangers the functioning of the radionavigation service and aeronautical communications.[1] *See Second Report and Order in Docket No. 21006, supra*, at 524. Accordingly, Triad was directed by the Field Operations Bureau to cease operations in the frequency bands 108-137 MHz and 225-400 MHz, because such endangerment constituted harmful interference as defined by §76.613 of the Rules. Triad complied by curtailing service in the relevant frequency bands. On February 7, 1991, Triad was authorized by the Field Operations Bureau to resume normal operations, based upon Triad's corrective actions as demonstrated by a new CLI report. On February 28, 1991, Commission staff again inspected Triad's cable system and discovered signal leakage in violation of §76.605 of the Rules, but not at levels which exceeded the CLI standards.

Based upon the above facts, it appears that the Triad system has been radiating in excess of the Commission's standards and that this noncompliance threatened the Commission's regulatory goal of compatibility between the use of frequencies by cable television systems and various services in the same area. We note that Triad complied immediately with the staff's directive and has now eliminated the cited excessive signal leakage. However, such corrective action does not excuse Triad's initial failure to maintain the integrity of its cable distribution plant or relieve it of liability for such dereliction. In determining the amount of a forfeiture, we are guided by our recently adopted *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *reconsideration pending*, which take into consideration the factors set forth in §503(b)(2) of the Communications Act of 1934, as amended. Under these standards, $12,500 is the base forfeiture for unauthorized signal emissions. Here, the leakage measured on the first day was severe and, in fact, exceeded the CLI criteria. In addition, serious leakage problems in violation of §76.605 were discovered on the second day of inspection. We find the level of the initial signal leakage violation to be a substantial aggravating factor, because of the serious threat to the public safety caused by such operation. *See TCI Cablevision of Maryland, Inc.*, 6 FCC Rcd 6487 (1991). Consequently, because the violation was egregious, applying the standards, we are increasing the forfeiture to $23,750.

In regard to this forfeiture Triad may take any of the actions set forth in §1.80 of the Commission's Rules, as summarized in the attachment to this letter.

This letter was adopted by the Commission on January 6, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

APPENDIX I
TRIAD COMMUNICATIONS COMPANY, Hastings, MI

DATE	LOCATION	MICROVOLTS/ METER
1/22/91	Corner of Church & Bond	3775
1/22/91	500 South Market	777
1/22/91	Corner of Bond & Cass	245
1/22/91	Across from 812 Jefferson	1076
1/22/91	618 Marshall	774
1/22/91	Woodlawn (behind W. Michigan Head & Neck)	310
1/22/91	Intersection of Taffee/ High/Congress Streets	361
2/28/91	Intersection of Taffee/High/Congress	123
2/28/91	Corner of Taffee and State	177

All measurements were made on 121.2625 MHz.

FOOTNOTE

[1] The provisions of §76.611 are applicable to all cable television systems which transmit carriers or other signal components carried at an average power level equal to or greater than 10^{-4} watts across a 25 MHz bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108-137 and 225-400 MHz for any purpose. Triad's signal use satisfies these conditions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Heart of Texas
Communications, Limited
Former Licensee of Radio Station
KYZZ(FM), Belton, TX

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 1992; Released: January 22, 1992

By the Chief, Mass Media Bureau:

1. The Commission by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a $5,000 Notice of Apparent Liability (NAL) issued June 10, 1991. To date, no response has been filed by Heart of Texas Communications, Limited, the licensee at the time of the violation.[1] Subsequently, the license was assigned to Sheldon Communications, Inc.

2. The forfeiture was assessed against Heart of Texas Communications, Limited in the amount of five thousand dollars ($5,000) for its apparent willful violation of Section 73.1216 of the Commission's Rules. The Commission determined that Heart of Texas Communications Limited failed to award the announced prize in accordance with the terms of the contest. The facts are set forth in full detail in the NAL, are uncontroverted, and will not be repeated here.

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Heart of Texas Communications, Limited, previously the licensee of Radio Station KYZZ(FM), Belton, TX, FORFEIT to the United States the sum of five thousand dollars ($5,000) for its apparent willful violation of Section 73.1216 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] On June 10, 1991, the NAL assessed against Heart of Texas Communications, Limited, was sent to its address of record. The Commission received a letter dated July 9, 1991 from John E. Fiorini, III, Esq., on behalf of Sheldon Communications, Inc., the station's current licensee. The letter indicates that the license for KYZZ(FM) (now KOOC(FM)) was assigned to Sheldon Communications and the assignment was consummated May 31, 1991. Sheldon states that it had no involvement in the subject contest which was conducted in March 1990. The letter also indicates that Sheldon forwarded a copy of the NAL to the former licensee of the station. Furthermore, the Commission has received a letter dated October 8, 1991 from Charles Chandler Davis, Esq. that indicates that he no longer represents the former licensee and it is his understanding that Heart of Texas Communications, Limited is bankrupt and all of the general partners are individually bankrupt.

ATTACHMENT

LETTER
June 10, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. Charles Chandler Davis 8310-FC
General Manager C10-211
Heart of Texas Communications, Limited
Licensee, Radio Station KYZZ(FM)
P.O. Box 240
Belton, TX 76513

Dear Mr. Davis:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On April 28, 1990, the Commission received a complaint from Mr. J.R. Donley alleging that on March 6, 1990, KYZZ(FM) conducted a "Cash Crusaders" contest promotion at the Academy High School's campus. Under the terms of that contest, participants who could identify the station's "Cash Crusader" while he or she was on campus would win $100. Mr. Donley alleged that he identified the "Cash Crusader" and received a letter from the station naming him as a $100 winner in the contest. Mr. Donley further alleged that he was instructed to mail the letter to the station in order to receive his prize. He stated that, although he mailed the letter to the station, made numerous phone calls and visited the station, he still has not received his prize. Additionally, he alleged that there are several other individuals who received letters from the station identifying them as winners who have not received their prizes.

Based on this complaint, the Commission sent you a letter of inquiry on June 19, 1990. In your responses dated July 16, and September 10, 1990, you indicate that the general manager for the station at the time the "Cash Crusaders" promotion was being conducted was interviewed and recalled the promotion. You admit that after

that individual left the station, in May 1990, there were several claims regarding payment of "Cash Crusaders" prize winners and that there were also allegations of favoritism and improperly awarded prizes. You explain that the station has made attempts to resolve the matter by identifying the prize winners and obtaining funds to pay them.

You also explain that the licensee has negotiated partial settlements with some of the prize winners but note that certain claims of prize winners remain unresolved. You propose that a lawsuit be filed in Texas civil court, giving notice to all "Cash Crusaders" claimants, and by having the court appoint a Master to determine the validity of, and to pay the claims.

The licensee asks the Commission to approve this plan. Subsequently, the Commission received comments from the complainant's father, Mr. Dennis Donley, indicating that, as of November 7, 1990, his son had not received his prize.

Based on the foregoing, and by your own admission, Radio Station KYZZ(FM), willfully violated Section 73.1216 of the Commission's Rules with respect to the "Cash Crusaders" promotion by failing to conduct the contest substantially as announced or advertised in that you failed to award a contest winner, Mr. J. R. Donley, the announced contest prize. You also admit that other "cash Crusaders" prize winners have not been awarded their prizes. Therefore, it appears that a forfeiture is appropriate.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Heart of Texas Communications, Limited, licensee of Radio Station KYZZ(FM), Belton, TX, is hereby advised of its Apparent Liability for Forfeiture in the amount of $5,000 for its apparent willful violation of Section 73.1216 of the Commission's Rules on the date set forth above.[1] The amount specified was reached after careful consideration of the factors set forth in Section 503(b)(2) of the Communications Act.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Notice of Apparent Liability.

Additionally, with respect to your proposal to ameliorate the situation, Section 73.1216 of our Rules requires licensees to award announced prizes for contests they conduct without winners instituting lawsuits. Therefore, we cannot approve your proposal. However, we would consider evidence that you have awarded the announced prize to Mr. Donley and to all other individuals who were not awarded prizes after receiving letters from the station identifying them as winners, in conjunction with any request you may make for reduction or rescission of the forfeiture.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] Although the violation commenced outside of the statute of limitations, license renewal having been granted KYZZ(FM) on September 28, 1990 (*see* 47 U.S.C. Section 503(b)(6)), this forfeiture is only being assessed for that portion of the violation that continued into the one year period prior to the issuance of this Notice of Apparent Liability

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-234

In the Matter of

Amendment of Section 73.202(b), RM-7745
Table of Allotments,
FM Broadcast Stations.
(Hastings, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 23, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Heartland Radio, Inc. ("petitioner"), licensee of Station KEZH(FM), Hastings, Nebraska, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4808 (1991), proposing the substitution of Channel 268C for Channel 268C2 at Hastings, Nebraska, and the modification of the license of Station KEZH(FM) to specify operation on the higher class channel. Petitioner filed supporting comments. No other comments were received.

2. We believe the public interest would be served by allotting Channel 268C at Hastings, Nebraska, because it would enable Station KEZH(FM) to provide an expanded coverage area FM service to the community. Channel 268C can be allotted to Hastings at the site specified by petitioner, which is located 41.5 kilometers (25.8 miles) west of Hastings.[1] As stated in the *Notice*, the proposal for Hastings must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Commission's Rules regarding the Commission's monitoring station at Grand Island, Nebraska.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hastings, Nebraska	251C, 268C

4. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Heartland Radio, Inc. for Station KEZH(FM), Channel 268C2, IS MODIFIED to specify operation on Channel 268C, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission an application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Heartland Radio, Inc., licensee of Station KEZH(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the petitioner's suggested site for Channel 268C are 40-39-28 and 98-52-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-8

In the Matter of

Amendment of Section 73.202(b), RM-7713
Table of Allotments,
FM Broadcast Stations.
(Stock Island, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 13, 1992; Released: January 23, 1992

Comment Date: March 16, 1992
Reply Comment Date: March 31, 1992

By the Assistant Chief, Allocations Branch:

1. S-3 Communications Corporation ("petitioner") has requested the allotment of Channel 248A to Stock Island, Florida, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner submits that Stock Island is an unincorporated community located in Monroe County, with a population of 4,446.[1] Petitioner asserts that Stock Island has its own elementary school, volunteer fire department, restaurant, convenience stores and a dog track. Petitioner also states that Stock Island is the location of Florida Keys Memorial Hospital and Florida Keys Community Junior College.

3. A staff review of the proposal reveals that according to the 1991 Rand McNally *Commercial Atlas and Marketing Guide* ("Atlas"), Stock Island, Florida, is listed as a Census Designated Place ("CDP") by the Census Bureau. The atlas also indicates that Key West is the postal facility for Stock Island.

4. Channel 248A can be allotted to Stock Island in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction 3.4 kilometers (2.1 miles) west, [2] in order to avoid a short-spacing to the vacant allotment for Channel 249A at Marathon, Florida.

5. We believe the public interest would be served by proposing the allotment of Channel 248A to Stock Island, Florida, as that community's first local FM broadcast service. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Stock Island, Florida	--	248A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 16, 1992,** and reply comments on or before **March 31, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph A. Belisle
Leibowitz & Spencer
AmeriFirst Building
Suite 1450
One Southeast Third Avenue
Miami, Florida 33131
(Counsel for S-3 Communications Corporation)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

[1] Petitioner states that the population figures were taken from the 1980 U.S. Census.
[2] The coordinates are North Latitude 24-33-40 and West Longitude 81-46-18.

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications of

TOLEDO	File Nos.
BROADCASTING,	BR-890530WF
INC.	BRH-890530VF

For Renewal of Licenses of
Stations WSPD/WLQR(FM)
Toledo, Ohio

MEMORANDUM OPINION & ORDER

Adopted: January 2, 1992; Released: January 23, 1992

By the Commission:

I. INTRODUCTION

1. Before the Commission is (i) a Petition to Deny filed by the Ohio State Conference of Branches of the NAACP and the National Black Media Coalition (NAACP/NBMC) against the above-noted renewal applications of stations WSPD/WLQR(FM), Toledo, Ohio; (ii) an opposition filed by the licensee; and (iii) the licensee's responses to Commission inquiries. NAACP/NBMC allege that the stations have violated the Commission's EEO Rule. They request that we investigate the stations' EEO program and then designate the renewal applications for a hearing.

II. PROCEDURAL MATTERS

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, the petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with (the public interest, convenience and necessity)." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Dubuque Limited Partnership*, 4 F.C.C. Rcd. 1999 (1989). The allegations, except for those of which official notice may be taken must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. The licensee of WSPD/WLQR(FM) asserts that, because NAACP/NBMC failed to file supporting affidavits, they have not established standing. NAACP provided a timely declaration from James Daniel, President of the Ohio State Conference of Branches of the NAACP. Mr. Daniel, however, does not indicate that he is a listener of the stations or a resident within the service areas of the stations. Accordingly, pursuant to Section 73.3584(b) of the Commission's Rules, 47 C.F.R. Section 73.3584(b), NAACP's pleading will be considered as an informal objection.

4. With respect to NBMC, NBMC timely submitted a statement from Pluria Marshall, Chairman of NBMC and a resident of the Washington, D.C. area. The Commission, however, has previously held that the statement of a person who does not claim to be a listener of the stations nor a resident of the service area of the challenged stations does not satisfy the requirements of the Act. *See Michigan / Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we will consider NBMC's pleading as an informal objection.

III. DISCUSSION

5. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b), 73.2080(c).

6. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. If the application indicates a record of inadequate EEO efforts, the Commission will impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for a hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO Report), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by National Association of Broadcasters). See *e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*); *Bilingual-Bicultural Coalition v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

7. Review of the licensee's EEO record leads us to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that unconditional grant of the applications for renewal would have been inconsistent with the public interest. *Astroline, supra.*[1] Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP v. FCC, supra; Bilingual-Bicultural Coalition, supra.*

8. Upon analysis of the licensee's opposition and responses to our inquiries, we conclude that no substantial and material questions of fact remain as to whether the licensee discriminated. *Astroline, supra.* Accordingly, designation for hearing is not warranted. Our review, however, indicates a record of inadequate efforts. We will, therefore, grant the renewal applications subject to reporting conditions as detailed herein.

9. Review of the licensee's 1989 EEO program, its opposition and its inquiry responses indicates that during the period December 11, 1986[2] to May 30, 1989, the licensee had 15 overall full-time hiring opportunities including 13 upper-level hiring opportunities.[34] The licensee contacted the following sources for referrals: eight community organizations;[5] 12 educational institutions;[6] two broadcasters' associations;[7] two newspapers;[8] two trade publications;[9] and eight employment agencies.[10] In addition, the licensee relied on employee referrals, walk-ins, "word of mouth" applicants, and former applicants or employees.[11] The licensee interviewed 162 applicants, including 13 minorities (six Blacks) for upper-level positions. Blacks appeared in four of the 13 upper-level interview pools.[12] The licensee hired no minorities for its 15 hiring opportunities.[13] The licensee failed to make modifications to its program until less than one week before the license term expired, when it added additional sources to its recruitment list.[14]

10. NAACP/NBMC state that the licensee's "EEO program, on paper, is not unreasonable." However, they criticize the licensee's failure to hire any Blacks, the dominant minority group, for any upper-level position. In addition, they assert that the licensee appears to have attended to its EEO obligations only at the end of the license term.

11. The licensee counterargues that it has always made strong efforts to seek out qualified minority applicants. It states that it has contacted numerous minority and female recruiting sources for virtually every full-time job opening.[15] The licensee also asserts that it encouraged present employees to refer minority and female job applicants and informed employees and applicants of its equal employment opportunity policy. With regard to its employment profile, the licensee asserts that it has improved minority representation at the stations since it took control in 1986.[16] The licensee explains that the drop in minority representation in 1989 was due to the departure of two minority employees in 1988.

12. Review of the licensee's EEO record reveals that the licensee failed to direct sufficient efforts towards the recruitment of qualified Blacks, the dominant minority group, for upper-level vacancies.[17] The licensee interviewed only six Blacks among 162 applicants for its 13 upper-level positions. In addition, the licensee did not include any Blacks in the interview pool for nine of its 13 upper-level job vacancies. Further, we note that the licensee did not hire Blacks or other minorities for any of its 15 full-time vacancies and did not employ Blacks in any full-time upper-level position from the time it acquired the stations until May 1989, when it promoted two Blacks to upper-level positions. Despite the small number of Blacks in the upper-level interview pool and the absence of Blacks from the licensee's upper-level hires and work force, the licensee failed to make any modifications to its EEO program until the very end of the license term, *i.e.*, September 25, 1989, six days before the license expiration date and 25 days after the petition to deny was filed.

13. This case is less egregious than *WROV Broadcasters, Inc., (WROV)*, 4 FCC Rcd 6157 (1989), *affd. on recon.*, 6 FCC Rcd 1421 (1991), in which we granted renewal subject to reporting conditions and imposed a $5,000 forfeiture. Both stations were located in areas with similar Black labor forces with Roanoke having 9.9% and Toledo having 8.8%. Generally, both licensees failed to employ Blacks in upper-level positions. In *WROV*, however, the licensee contacted recruitment sources for only two of its 42 upper-level job vacancies, whereas here WSPD contacted recruitment sources for 10 of its 15 positions. In addition, the licensee of WROV, which had 42 hiring opportunities, had a significantly greater number of hiring opportunities for which to recruit. Further, we note that the record for WROV showed an absence of Blacks in upper-level positions throughout the seven year license term. The licensee of WSPD/WLQR, however, acquired the stations less than three years before the license term expired and promoted two Blacks to upper-level positions, albeit late in the license term. Accordingly, WSPD's record is considerably better than WROV and a forfeiture would be inappropriate in this case.

14. Based on the foregoing, we will grant renewal of the licenses and impose reporting conditions to ensure that the licensee makes sufficient efforts to attract black applicants and engages in meaningful self-assessment on a continuous basis, particularly with regard to its upper-level positions.[18]

IV. ORDERING CLAUSES

15. Accordingly, *IT IS ORDERED* that the informal objection filed by NAACP and the National Black Media Coalition against stations WSPD/WLQR(FM) *IS DENIED*.

16. *IT IS FURTHER ORDERED* that the applications for renewal of license filed by Toledo Broadcasting, Inc. for stations WSPD/WLQR(FM) *ARE GRANTED* subject to the reporting conditions described herein.

17. *IT IS FURTHER ORDERED*, that Toledo Broadcasting, Inc. submit to the Commission an original and one copy of the following information on June 1, 1992, June 1, 1993, and June 1, 1994:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. This list should also note which recruitment sources were contacted;[19]

(b) A list of employees as of the May 1, 1992 payroll period for the first report and as of the May 1, 1993 and May 1, 1994 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

18. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the licensee have any questions

regarding this action or require further information concerning the employment reports, it may telephone the Mass Media Bureau's EEO Branch. ((202) 632-7069).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The stations were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the stations' EEO efforts toward both women and minorities and found their record of efforts with regard to women to be sufficient.

[2] The licensee acquired the stations on December 11, 1986.

[3] The licensee promoted one part-time Black employee to a full-time position as Public Affairs Director on May 29, 1989. In addition, the licensee promoted a Black female from FM "Traffic Clerk" to "Continuity Director" in May 1989. The license term ended October 1, 1989.

[4] Our primary focus here is the licensee's efforts in the upper-four category because virtually all (13 of 15) of the hiring positions were in the upper-four category.

[5] The licensee contacted the following community organizations: NAACP; NOW; AWRT; Women in Communications; University of Toledo, Center for Women; East Toledo Community Organizations; Catholic Diocese; and Ohio Hispanic Institute. The licensee contacted these organizations for ten of the 15 full-time positions. However, not all of the above organizations were contacted for each of the referenced ten full-time positions. For eight of the ten positions, the licensee contacted all of the sources on its list. For the two remaining positions, the licensee contacted the Toledo Branch of the NAACP and the Toledo Branch of Women in Communications.

[6] The licensee contacted the following educational institutions: Ferris State College; Ohio State University; University of Michigan; Michigan State University; Central Michigan University; Ohio University; Kent State University; University of Toledo; Bowling Green State University; Eastern Michigan University; Monroe County Community College and Specs Howard Placement. The licensee contacted educational institutions for 14 of the 15 positions. It is unclear, however, which specific sources the licensee contacted for each of the 14 positions.

[7] The licensee contacted NAB Employment Clearinghouse and Ohio Association of Broadcasters.

[8] The licensee contacted *Toledo Blade Want Ads* and the *Columbus Dispatch*.

[9] The licensee contacted *Broadcasting* and *Radio & Records*.

[10] The licensee contacted the following employment agencies: Ohio Bureau of Employment Services; Job Exchange; Private Industry Council; Action; Renhill; Norrell; Guadalupe Center Employment Service; and Veterans Employment Services. These sources were used for eight positions; however, it is unclear which specific sources were used for each position.

[11] The renewal application reflected a total of 16 minority referrals, 14 of which were referrals of blacks.

[12] Overall, minorities appeared in eight interview pools for upper-level positions.

[13] The Toledo MSA, in which the stations are located, has a 11.7% minority labor force (8.8% Black, 2.2% Hispanic, 0.5% Asian, 0.2% American Indian). The 1989 Annual Employment Report lists one (2.5%) Black, one Hispanic and one Asian among 40 full-time employees overall and one (2.9%) Asian among 35 upper-level employees. The 1988 and 1987 reports list three (7.1%) Blacks, one (2.4%) Hispanic and one Asian among 42 full-time employees overall and one (2.7%) Asian among 37 upper-level job employees. No Blacks are reflected in the licensee's 1987-1989 reports for upper-level positions.

[14] The licensee submitted a list of the following sources which it added to its recruitment list on September 25, 1989: Imperial Talent Agency; Westwood Talent Agency; National Broadcast Talent Agency; Owens Technical College; Ashland College; Davis Junior College; Stautzenberger College; Primera Iglesia Bautista; St. Steven's African American Methodist Episcopal Church; Greater St. Mary's Missionary Baptist Church; Galilee Missionary Baptist Church; Calvary Baptist Tabernacle; and Family Baptist Church. Although most of these sources were not listed in the licensee's EEO Program Report, the licensee states that many of these sources have previously referred job applicants. We note that three of these sources (Owens Technical College, Davis Junior Businesss College and Stautzenberger College) were listed on the licensee's EEO program Report as sources it contacted during the renewal period.

[15] The licensee notes that one of the sources it contacts is the Toledo Branch of the NAACP, a branch of one of the challenging parties. The licensee states that the NAACP has failed to refer any applicants for a full-time position during the time of the licensee's tenure as operator of the stations.

[16] The licensee relies on the stations' 1986 employment profile as support for its assertion that it has improved minority representation. The 1986 Annual Employment Report lists two (5.0%) minorities among 40 full-time employees overall and no minorities among 35 upper-level employees. The 1987 and 1988 reports list three minorities overall (11.9%) and one minority, an Asian, in the upper-four category (2.7%).

[17] Although we consider a station's overall minority employment in determining EEO compliance, we evaluate principally a station's efforts regarding the dominant minority labor force and non-dominant minorities that are present in the work force in significant numbers. *See Bilingual Bicultural Coalition, supra.*; *Applications for Renewal of Licenses of WBBE(AM)/WMGB-FM, Georgetown, Kentucky*, 4 FCC Rcd 8255, 8256 (1989).

[18] In this regard, we are mindful of pending assignment applications for stations WSPD/WLQR(FM) from Toledo Broadcasting, Inc. to Stratford Broadcasting Inc. The reporting conditions pass to the assignee as a matter of law upon the grant and consummation of the assignment.

[19] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JAYBAR COMMUNICATIONS — File No. 01885-CL-MP-91

For modification of facilities in
the Domestic Public Cellular
Telecommunications Radio Service
on Frequency Block A, in Market 323
Arizona 6 - Graham

In re Application of

DATA CELLULAR SYSTEMS — File No. 01239-CL-MP-91

For modification of facilities in
the Domestic Public Cellular
Telecommunications Radio Service
on Frequency Block A, in Market 345,
California 10 - Sierra

In re Application of

ALPHA CELLULAR — File No. 02370-CL-MP-92

For modification of facilities in
the Domestic Public Cellular
Telecommunications Radio Service
on Frequency Block A, in Market 410
Indiana 8 - Brown

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1992; Released: January 23, 1992

By the Deputy Chief, Mobile Services Division:

I. INTRODUCTION

1. Jaybar Communications (Jaybar), Data Cellular Systems (Data) and Alpha Cellular (Alpha) filed FCC Form 401 applications to modify their nonwireline cellular systems serving the Graham, Arizona 6 Rural Service Area (RSA) (market number 323A) (Station KNKN251),[1] the Sierra, California 10 RSA (market number 345A) (Station KNKN250)[2] and the Brown, Indiana 8 RSA (market number 410) (Station KNKN340), respectively.[3] The Committee for a Fair Lottery and Thomas Domencich (hereinafter jointly CFL) filed petitions requesting that the Commission (1) dismiss the applications without prejudice, (2) hold further processing of the applications in abeyance pending a resolution of the outstanding issues in *Algreg Cellular Engineering*, CC Docket Number 91-142, 6 FCC Rcd 2921 (Com. Car. Bur. 1991) (risk sharing proceeding or designation order)[4] or (3) add the applications to the risk sharing proceeding. Applicants Against Lottery Abuses (AALA) filed a petition requesting that the Commission either deny Alpha's application or hold further processing of Alpha's application in abeyance pending a resolution of the outstanding issues in the risk sharing proceeding. Responsive pleadings were filed. Because CFL and AALA's petitions raise similar issues, we are considering all of their petitions in this order. For the reasons set forth below, we will conditionally grant Jaybar, Data and Alpha's applications and deny CFL and AALA's petitions.

II. DISCUSSION

2. CFL and AALA contend that Jaybar, Data and Alpha's applications are ungrantable under Section 309(a) of the Act[5] because their qualifications to hold a Commission license are at issue in the pending risk sharing proceeding. Also, CFL asserts that because the Bureau consolidated other previously-filed modification applications[6] with the risk sharing proceeding, granting the instant applications would be "an 'end run' around the clear intent of the Bureau regarding system modifications during the pendency of the revocation proceeding." *See* CFL petitions at 3. Jaybar, Data and Alpha argue that they were found qualified to be Commission licensees when their authorizations were granted and the designation order did not suspend their authorizations to operate their cellular systems. Alpha also argues that a grant of its application will serve the public interest and will not influence the outcome of the risk sharing proceeding.

3. The Commission has determined that there is an immediate and pressing need for nationwide high quality cellular service.[7] Deferring action on the instant applications pending the resolution of the risk sharing proceeding would frustrate the public's interest in expeditiously receiving cellular service and the Commission's goal to provide excellent service to the public in the most timely manner possible. Further, a grant with conditions would not prejudice the outcome of the risk sharing proceeding and would improve service to the subscribers in the encompassed markets. Therefore, we find that it is in the public interest under Section 309(a) of the Act to grant Jaybar, Data and Alpha's applications conditioned upon any action that may be taken and/or findings that are made by the Commission in the risk sharing proceeding.

III. ORDERING PARAGRAPHS

4. Accordingly, IT IS ORDERED that the petitions filed by The Committee for a Fair Lottery and Thomas Domencich against Jaybar Communications, Data Cellular Systems and Alpha Cellular ARE DENIED.

5. IT IS FURTHER ORDERED that the petition filed by Applicants Against Lottery Abuses against Alpha Cellular IS DENIED.

6. IT IS FURTHER ORDERED that the applications of Jaybar Communications (File Number 01885-CL-MP-91), Data Cellular Systems (File Number 01239-CL-MP-91) and Alpha Cellular (File Number 02370-CL-MP-92) ARE GRANTED, conditioned upon any action that may be taken and/or findings that are made by the Commission in CC Docket Number 91-142.

7. This Order is issued under Section 0.291 of the rules and is effective upon release. Petitions for reconsideration under Section 1.106 of the rules or applications for re-

view under Section 1.115 of the rules may be filed within thirty days of the public notice of this Order. *See* 47 C.F.R. §1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Myron C. Peck
Deputy Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Report No. CL-92-5 at 4 (released October 9, 1991); *see also* Jaybar application, engineering statement at 1 (Jaybar proposes to modify an existing cell and add two cells).

[2] *See* Public Notice, Report No. CL-91-200 (released August 30, 1991); *see also* Data application, Exhibit 1 ("Data proposes to construct one additional cell site and to modify the Cellular Geographic Service Area (CGSA)").

[3] *See* Public Notice, Report No. CL-92-17 (released November 12, 1991); *see also* Alpha application, engineering statement at 2 (Alpha proposes to modify two existing cells and add six cells).

[4] In its designation order, the Bureau, *inter alia*, ordered Jaybar, Data and Alpha to show cause why their authorizations for market numbers 323A, 345A and 410A, respectively, should not be revoked under Section 312(a) of the Communications Act of 1934, as amended (the Act) for violation of Sections 22.33, 22.921 and 22.922 of the Commission's rules. *See* Designation Order at 2928 ("[t]he hearing will include inquiry into all the facts and circumstances of . . . [Jaybar, Data and Alpha's] actions or involvement with regard to" agreements styled as "Mutual Contingent Risk Sharing Agreements" and "allow . . . [the Administrative Law Judge] to evaluate . . . whether they are qualified to retain their authorizations"). Sections 22.33, 22.921 and 22.922 prohibit partial settlement agreements among nonwireline RSA applicants, multiple ownership interests in competing nonwireline RSA applications and the transfer of interests in pending applications, respectively.

[5] Section 309(a) provides that

> [t]he Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 308(a) provides that "[t]he Commission may grant construction permits and station licenses, or modifications . . . thereof, only upon written application . . . ."

[6] *See* Designation Order at 2930 fn. 5.

[7] *See* An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order, 86 FCC 2d 469, 489, 490 (1981), *modified*, 89 FCC 2d 571 (1982), *appeal dismissed sub nom* United States v. FCC, No. 82-1526 (D.C. Cir. 1983); *see also* Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules (First Report and Order and Memorandum Opinion and Order on Reconsideration), 6 FCC Rcd 6185 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-3

In re Applications of

COLONIAL COMMUNICATIONS, INC.	File No. BPH-860801MB
BEDFORD CONCEPTS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-860804ME
DONNA A. MacNEIL	File No. BPH-860804MF
APPLEDORE COMMUNICATIONS, INC.	File No. BPH-860804MI

For Construction Permit for a New FM Station, Channel 243A in Bedford, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1991; Released: January 23, 1992

By the Commission:

1. Appledore Communications, Inc. (ACI) has petitioned for reconsideration of the Commission's decision in *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991).[1] That decision affirmed the Review Board's grant of Donna A. MacNeil's application for a new Bedford, New Hampshire, FM station and denied ACI's application for review. In this decision, we are dismissing ACI's petition as procedurally deficient.

2. The Commission's rules provide that, where the Commission has denied an application for review, it will entertain a petition for reconsideration only if the petition relies on facts relating to new or changed circumstances or on facts unknown to the petitioner since its last opportunity to present such matters. 47 C.F.R. § 1.106(b)(2). ACI's citation to the Supreme Court decision in *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990), without explaining that decision's relevance, and its disagreement with the Commission's weighing of the facts in the record do not satisfy the new facts or changed circumstances standard of section 1.106(b). We believe that some additional comment is warranted, however.

3. First, ACI's challenge to the constitutionality of the qualitative integration enhancement that MacNeil received as a female does not affect the result. The Commission is obligated by statute not to depart from female preferences. Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1992, Pub. L. (102-140, 105 Stat. 782 (1991). Moreover, ACI has not provided any material support for its position.

4. In addition, we disagree with ACI's assertion that the Commission did not properly follow *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶ 18 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 3712 (1990), and *Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991). In *The Baltimore Radio Show*, the Review Board reiterated the Commission's preference for integrated applicants with "a knowledge of and interest in the welfare of the community," citing *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). This is indicated by objective information about applicants' local residence and past civic activities, not the subjective "understanding of this community" advocated in ACI's Petition for Reconsideration, at 7.

5. In making the evaluation in this case, the Commission treated the applicants' local residence and civic activities as a unified comparative factor in accordance with *Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991), and the *Policy Statement*. *See Colonial*, 6 FCC Rcd at 2297 ¶¶ 8, 11. The Commission found that the balance favored MacNeil. She has lived continuously in Bedford and neighboring Manchester for a significant number of years and, until about four years before filing her application, showed a long pattern of some civic involvement.

6. Silberberg, on the other hand, earned full credit only for his two and one-half years residence in the area and his civic activities in the year before ACI filed its application. His childhood residence in the area is significantly discounted because of the long hiatus between it and his more recent full-time residence as an adult.[2] His civic activities, although more numerous and more recent than MacNeil's, began only the year before ACI filed.[3] His post-filing activities continued through the hearing but must also be discounted under the *Policy Statement*, 1 FCC 2d at 396, because of our emphasis on pre-filing activities to avoid the unfairness of comparative upgrading. An applicant is entitled "at most, to only a minor enhancement credit" for activities begun after the application was filed and to "again diminished" credit for activities continued after the filing. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd at 6441 ¶ 19. *See* also *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991). Compare *Ronald Sorensen*, 6 FCC Rcd 1952, 1953 ¶¶ 7-11, *recon. denied*, 6 FCC Rcd 6901 (1991) *appeals filed*, Nos. 91-1208, 91-1213 (D.C. Cir., May 8, 1991), where the winning applicant, a long-term resident of the community, had an impressive number of activities over a number of years and "was a founder of or involved in the leadership of an extremely wide range of groups," and the losing applicant, a longer-term resident of the community, had discontinued his few periodic activities about twelve years before the application. In this case, embellishing Silberberg's credit for local residence and civic activities with minor or minimal additional weight for his childhood residence in the area and post-filing civic activities does not tip the balance to ACI. The repetitious arguments to the contrary in ACI's petition warrant no further consideration.

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed May 31, 1991, by Appledore Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] ACI filed its Petition for Reconsideration on May 31, 1991. Donna A. MacNeil filed her Opposition to Petition for Reconsideration on June 13, 1991. ACI filed a Reply on June 20, 1991. Colonial Communications, Inc., and Bedford Concepts, a California Limited Partnership, the remaining parties at the application for review stage, have not petitioned for reconsideration or appealed the Commission's decision pursuant to 47 U.S.C. § 402(b), so the Commission's decision is final as to them.

[2] ACI points to Silberberg's family roots in the area to show he is not a newcomer, but this information was admitted into the record only because of assurances that it was background and not submitted to establish entitlement to an enhancement credit. Tr. 321-22. ACI also notes that Silberberg vacationed in the area but gives no record cites about the frequency or duration of visits. "[W]e have never held that area familiarity is sufficient to overcome long term local residence." *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 955 n.5 (1985).

[3] He became active in his son's sports and scouting activities (helping at games and as assistant den father) and in the Young Leadership Group of the Manchester Jewish Federation the year before ACI filed its application. ACI Ex. 4, Tr. 307, 369-70. He helped his wife start a brownie troop after ACI had filed, Tr. 371, and he was chairman of two committees for the Young Leadership Group at the time of the hearing. Tr. 307. Silberberg also helped found the Monadnock Preservation Association, but the record discloses little information about this. *See Colonial*, 6 FCC Rcd at 2297 ¶ 9. *See* also *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991) ("activities that occurred at an unspecified time must be similarly discounted").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
WDIX, Yadkinville, North Carolina

File No. BP-870331BK

For a Construction Permit
for a Modification of Facilities

TRIAD NETWORK, INC.
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1992; Released: January 23, 1992

By the Commission: Commissioner Barrett not participating.

1. Before the Commission for consideration are an Application for Review and a Supplement thereto filed July 25 and August 19, 1991, respectively, by Triad Network, Inc. (Triad) and the law firm of Maupin Taylor Ellis & Adams, P.C. (MTE&A), and an Opposition to the Supplement filed August 26, 1991, by Palmetto Communications Company.[1] Triad and MTE&A seek review of a Review Board decision, *Palmetto Communications Company*, FCC 91R-62, released July 18, 1991, dismissing their appeal of a *Memorandum Opinion and Order*, FCC 91M-1929, released June 19, 1991, by Administrative Law Judge Edward J. Kuhlman (ALJ). The ALJ's order directed Triad's counsel and his law firm, MTE&A, to discontinue their representation of Triad in this proceeding. We will grant review and, for the reasons that follow, set aside the Board's and the ALJ's decisions.

BACKGROUND

2. The Board affirmed the ALJ's initial decision granting the above-captioned application of Palmetto Communications Company. *Palmetto Communications Company*, 6 FCC Rcd 1527 (1991), *affirming*, 5 FCC Rcd 5154 (1990). The Board, like the ALJ, found that Palmetto was entitled under 47 U.S.C. § 307(b) to a dispositive preference over Triad, as Palmetto would provide a first nighttime transmission service to its community of license, Yadkinville, North Carolina. Prior to the release of the Board's decision, however, Triad requested a reopening of the record and an enlargement of hearing issues, alleging that Palmetto had concealed its true ownership structure and was thus unqualified to be a Commission licensee. In support of that request, Triad submitted an affidavit, dated March 22, 1991, from Robert C. Rickenbacker, Jr., wherein he stated that, even though he was listed as a partner in Palmetto's August 30, 1989 assignment application and had subsequently co-signed with William B. Hallman, Palmetto's other named partner, a promissory note for the purchase of the station on November 6, 1989,[2] he had withdrawn from the Palmetto partnership in early December 1989. He has had no ownership or other interest in that applicant since that time.

3. Relying on the above, and also noting that Palmetto's November 7, 1989, diversification and integration statement listed Rickenbacker and Hallman as each owning 50% of the general partnership, the Board set aside its earlier decision and remanded the proceeding to the ALJ to determine at hearing (1) whether Palmetto was lacking in candor and/or misrepresented facts concerning its ownership structure, and (2) whether it violated 47 C.F.R. § 1.65 by failing to report major changes in its ownership. *Palmetto Communications Company*, 6 FCC Rcd 2193 (1991). In doing so, the Board also observed that Palmetto had charged Triad's counsel with a patent conflict of interest, as he was representing simultaneously both Triad in this proceeding and Rickenbacker, a Palmetto principal, with respect to the latter's application for a new FM station in Bowman, South Carolina. The Board further observed that Palmetto also asserted that Triad's counsel had to have known in January 1991, when he became Rickenbacker's counsel in the Bowman proceeding, of the information upon which Triad relied in seeking to reopen the record in this case in March 1991, *i.e.*, Rickenbacker's purported withdrawal from the Palmetto partnership. The failure of counsel and Rickenbacker to come forth with this information earlier, Palmetto contended, was an abuse of the Commission's processes. Expressing its concerns as to these matters, the Board instructed the ALJ to compile a full and complete record. *Id.* at 2195 n.7.

4. Relying on the Board's n.7, *supra*, the ALJ thereafter ordered Triad's counsel either to withdraw or to show cause why he should not be disqualified. FCC 91M-1545 released May 3, 1991. Electing the latter course, counsel responded by claiming that his representation of Triad and Rickenbacker did not create a conflict of interest in this case. This was so, counsel maintained, because prior to the time in early 1991 that he agreed to represent Rickenbacker in the Bowman proceeding, Rickenbacker had informed counsel that he had severed all interests in the Palmetto partnership in late 1989. Given that representation, and having obtained the informed consent of Triad and Rickenbacker to represent both, counsel contended that his dual representation was therefore entirely proper and did not result in an impermissible conflict of interest.[3] Response to Order to Show Cause filed May 10, 1991. Palmetto, in contrast, maintained that Rickenbacker was still a party-in-interest in Palmetto, as neither he nor counsel had shown what legal measures were taken by Rickenbacker to withdraw from the partnership. According to Palmetto, until such matters were finally resolved, it was apparent that counsel's dual representation of Triad and Rickenbacker posed a serious conflict of interest warranting counsel's removal. Comments on Response to Show Cause filed June 6, 1991.

5. By FCC 91M-1929, released June 19, the ALJ ordered counsel and MTE&A to withdraw their appearance in this case and further ordered Triad to obtain new counsel within 10 days. Based on the record before him, the ALJ concluded that Triad's counsel had not shown the absence of any conflict of interest due to his dual representation of both Triad and Rickenbacker. Rather, the ALJ noted that Palmetto had shown otherwise by demonstrating that Triad and Rickenbacker do in fact have adverse and conflicting interests, since the latter had been able earlier to impose his separate interests to the detriment of Triad by preventing a settlement of this case.

6. MTE&A then filed its appeal of the ALJ's ruling with the Board. Shortly thereafter, Triad retained new counsel, and MTE&A filed a notice of withdrawal as counsel for Triad. Because of these events, the Board subsequently dismissed the Triad/MTE&A appeal as moot. *Palmetto Communications Company, supra.*

DISCUSSION

7. We agree with Triad/MTE&A that the Board's dismissal of their appeal was improvident. We note that MTE&A's notice of withdrawal as counsel was specifically made subject to its appeal of the ALJ's ruling. Moreover, 47 C.F.R. § 1.301(a)(5) provides that an ALJ's ruling removing counsel is appealable as a matter of right by counsel on his own behalf or by his client. To hold, as the Board did, that retention of new counsel by the applicant automatically negates those appeal rights would, we believe, render meaningless § 1.301(a)(5). Accordingly, we shall set aside the Board's decision.

8. In a supplement to their application for review, Triad/MTE&A report that Rickenbacker has now retained new counsel to represent him in the Bowman proceeding in place of MTE&A and has entered into a settlement agreement for the dismissal of his application; that Rickenbacker's new counsel is also representing him individually in this proceeding; and that, in view of the foregoing, any conflict of interest MTE&A may have suffered as a result of its representation of Triad and Rickenbacker have now been removed. Supplement to Application for Review filed August 19, 1991. In light of these recent and significant developments, and in the absence of any showing that MTE&A's representation of Triad would now jeopardize the integrity of this proceeding, we will vacate the ALJ's ruling and allow MTE&A to resume its representation of Triad.

9. ACCORDINGLY, IT IS ORDERED, That the Board's decision, *Palmetto Communications Company*, FCC 91R-62, released July 18, 1991, and the ALJ's *Memorandum Opinion and Order*, FCC 91M-1929, released June 19, 1991, ARE SET ASIDE.

10. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed July 25, 1991, and the Supplements thereto filed August 19 and September 9, 1991, by Triad and MTE&A ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

11. IT IS FURTHER ORDERED, That the Motion for Leave to file Supplement to Application for Review and Supplement filed September 9, 1991, by Triad and MTE&A, the Motion for Leave to file Third Supplement to Application for Review and Supplement filed September 12, 1991, by MTE&A, the Motion for Leave to file Fourth Supplement to Application for Review and Supplement filed September 20, 1991, by MTE&A, the Motion for Leave to file Fifth Supplement to Application for Review and Supplement filed September 23, 1991, by MTE&A, and the Motion to Strike filed October 4, 1991, by MTE&A ARE DISMISSED as moot in view of the action here taken.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also before us are a Motion for Leave to file Supplement to Application for Review and Supplement filed September 9, 1991, by Triad and MTE&A; a Motion for Leave to file Third Supplement to Application for Review and Supplement filed September 12, 1991, by MTE&A; an Opposition thereto filed September 18, 1991, by Palmetto Communications Company (Palmetto); a Motion for Leave to file Fourth Supplement to Application for Review and Supplement filed September 20, 1991, by MTE&A; an Opposition thereto filed September 24, 1991, by Palmetto; a Motion for Leave to file Fifth Supplement to Application for Review and Supplement filed September 25, 1991, by MTE&A; and a Motion to Strike Palmetto's Opposition of September 24, 1991, filed October 4, 1991, by MTE&A.

[2] Palmetto acquired Station WDIX from Childress Radio Company after Childress and Triad had filed competing applications for the license at issue in this proceeding. Upon the Commission's approval of its assignment application, the ALJ permitted Palmetto to succeed Childress in this case. FCC 89M-2822, released December 22, 1989.

[3] In support of his showing, counsel relied on a March 1, 1991 letter to the Secretary of the FCC from Rickenbacker informing the Commission that he had never obtained an interest in Station WDIX, even though he and Hallman had filed: an application for the assignment of license for that station; affidavits from Rickenbacker wherein he states that he had severed all ties in the Palmetto partnership in early December 1989, and recounts the reasons why he did so; and an affidavit from a former employee of Station WDIX wherein the affiant states that she was informed in late 1989 by Hallman that Rickenbacker was no longer a partner in Palmetto.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-168

In the Matter of

Codification of the Commission's
Political Programming Policies

REPORT AND ORDER

Adopted: December 12, 1991; Released: December 23, 1991

By the Commission: Chairman Sikes concurring in part and dissenting in part and issuing a separate statement: Commissioners Quello, Marshall, Barrett and Duggan issuing separate statements.

TABLE OF CONTENTS

	Paragraph
I. Introduction and Summary	2
II. Reasonable Access	6
A. Formal guidelines for reasonable access	7
B. Access for state and local candidates	10
C. News Programming	13
D. News Adjacencies	18
E. Weekend Hours	19
III. Equal Opportunities	24
A. Bona Fide Newscast Exemption	26
B. "Uses" under Section 315(a)	30
C. Sponsorship ID Guidelines	39
D. Audio and Visual Identification	46
E. Pre-Airing Submissions	48
IV. Lowest Unit Charge	50
A. Obligation to Make Rates Available	51
B. Most-favored advertiser	61
C. Classes of Time	64
D. Weekly Rotations	82
E. Increase in Rates During Election Period	88
F. Calculation of Rebates	91
G. Package Plans	93
H. Merchandising Incentives and Bonus Spots	99
I. Fire Sale	103
J. Timely Make Goods	108
K. Calculation of Make Good in LUC	113
L. Sold-Out Time	117
V. Political File Requirements	120
ORDERING CLAUSES	125

1. By this *Report and Order*, the Commission revises its existing rules[1] regarding political broadcasting. This action represents a comprehensive guide to political broadcasting and, as indicated herein, supersedes previous Commission interpretations of the political broadcasting provisions of the Communications Act.[2]

I. INTRODUCTION AND SUMMARY

2. We initiated the Notice of Proposed Rulemaking (*NPRM*) in this proceeding, 6 FCC Rcd 5707 (1991), in response to continuing questions concerning our political programming policies. As we described in the *NPRM*, a July 1990 audit of thirty television and radio stations revealed that political candidates often pay higher prices for airtime than commercial advertisers, primarily because "candidates purchase[ ] time at nonpreemptible 'fixed' rates while commercial advertisers purchase[ ] time at 'preemptible' rates." [3] The audit raised questions whether candidates' advertising choices may be related to a lack of the types of negotiations that often occur between a station and a commercial advertiser. [4] In addition, the numerous inquiries received by Commission staff in the wake of the audit made it clear that there is a need for a single, up-to-date source describing our political programming policies.

3. We have therefore sought in this proceeding to accomplish several objectives. First, we intend to more accurately and closely reflect the language, intent, and requirements of the political broadcasting portions of the Act. In addition, we seek to issue detailed and practical advice, spelled out in clear and specific Commission rules[5], so that broadcasters, candidates, advertising buyers and the public may be fairly and consistently apprised of the duties required by and rights accorded under the statute. Finally, we seek to revise our rules in order to promote achievement of the Act's objectives while being responsive to the evolving sales practices of broadcast

---

[1] The Commission's rules are codified in Sections 73.1940 and 76.205, pertaining to broadcasting stations and cable television systems, respectively.

[2] 47 U.S.C. Sections 312(a)(7), 315. *See infra* at para. 3. Previously, the Commission has had occasion to issue numerous interpretations, both comprehensive and *ad hoc*, of these statutory requirements. For example, in 1978 the Commission issued a comprehensive guide to complying with the Commission's political programming rules, which it then revised in 1984. *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476 (1984) (*"1984 Political Primer"*). The primer was followed by a *1988 Public Notice*, which concentrated on the application of Section 315(b)'s lowest unit charge provision. *See* 4 FCC Rcd 3823 (1988).

[3] *Mass Media Bureau Report on Political Programming Audit*, 68 RR 2d 113 (1990) (*"1990 Audit Report"*).

[4] *Id.*

[5] We have decided to issue detailed rules rather than a *Primer*. In addition, we will ensure that oral advice of the Commission staff on new and significant issues is reflected in written form, which is publicly available.

stations. [6] Toward that end, we have determined that licensees must provide more timely, accurate, and complete information on rates and sales practices to candidates. Such information will help candidates take advantage of the full benefits to which they are entitled under the law.

4. The following discussion addresses the concerns raised by the commenting parties and resolves the issues raised in the *NPRM*. [7] Specifically, by this action the Commission does the following:

(A) *Reasonable Access.* Section 312(a)(7) requires stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time." [8] In this regard the Commission will:

(i) Continue to rely upon the reasonable good faith judgments of licensees to determine what constitutes reasonable access.

(ii) Adhere to its current interpretation that Section 312(a)(7) does not apply to cable television systems.

(iii) Retain our policy of permitting stations to ban federal candidates from news programming.

(iv) Permit sales of a "news-adjacency" class of time to candidates only if such a class of time is sold at rates no higher than sales of such time to most-favored commercial advertisers.

(v) Require stations to provide access for federal candidates to the station over the weekend preceding an election if that station has provided similar services to any commercial advertiser during the year preceding the relevant election period.

(B) *Equal Opportunities.* Section 315(a) requires stations that permit legally qualified candidates to use their station to afford equal opportunities to the candidates' opponents. Bona fide newscasts, as well as news interviews, documentaries, and news events, are exempt from these requirements. [9] In this regard the Commission will:

(i) Continue to interpret the "bona fide newscast" exemption as requiring only that licensees exercise control over the newscast by exercising editorial discretion whether or not to air the program.

(ii) Narrow the definition of a "use" by a "candidate" to include only uses of a licensee's facilities that are controlled, approved or sponsored by a candidate after becoming legally qualified.

(iii) Continue to defer to licensees' reasonable, good faith judgment in determining whether sufficient sponsorship identifications have been provided in political programming and advertising.

(iv) Require *both* audio and visual sponsorship identification for television advertisements.

(v) Continue our present policy that permits stations to request candidates to submit their advertisements in advance to allow the station to determine whether the ad constitutes a use by a candidate and whether it complies with the sponsorship identification requirements. If a candidate refuses to allow the station to pre-screen the ad, the station should advise the candidate that it will take whatever steps are necessary to add the appropriate sponsorship identification to the submitted material.

---

[6] As we stated in the *NPRM*, over the years the industry has moved away from a system based primarily upon the sale of volume discounts to a system that uses a "grid card" to give stations greater flexibility in selling their fixed inventory of advertising time. The latest development appears to be the introduction of a "yield maximization" system, under which spots are in essence auctioned off to the highest bidder, and the price of a given class of time changes constantly to respond to the broadcasters' needs and advertisers' fluctuating demand.

[7] We received 39 comments and 13 reply comments in this proceeding. *See* Appendix A.

[8] Section 312(a)(7) of the Communications Act creates a specific right of access only as to federal candidates. It provides:

> (a) The Commission may revoke any station license or construction permit --...(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[9] Section 315(a) of the Communications Act states:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any:
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. 47 U.S.C. Section 315(a).
>
> For purposes of Section 315, the terms "broadcasting station" or "licensee" includes "community antenna television."

(C) *Lowest Unit Charge*. Section 315(b) prohibits stations from charging candidates more than the lowest unit charge of the station for each class and period of time, and requires stations to offer candidates all discounts and privileges afforded its most-favored advertiser. [10] In this regard, the Commission will:

(i) Require stations to disclose to candidates all classes of time, discount rates, and privileges afforded to commercial advertisers. Furthermore, stations are required to sell such time to candidates upon request.

(ii) Continue to apply the "most-favored advertiser" standard to factors which affect the value of an advertisement, including (but not limited to) priorities against preemption.

(iii) Permit stations to establish their own reasonable classes of immediately preemptible time so long as some demonstrable benefit besides price or identity of the advertiser (such as preemption protection, scheduling flexibility, or guaranteed time-sensitive make goods) distinguishes each class. The licensee must adequately define each class, disclose it, and make it available to candidates.

(iv) Permit stations to establish their own reasonable classes of preemptible with notice time so long as they adequately define such classes, disclose them, and make them available to candidates.

(v) Permit stations to treat non-preemptible and fixed position as distinct classes of time, provided that they articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Continue the policy of prohibiting stations from creating premium-priced, candidates-only class of time.

(vii) Adopt a policy requiring stations to calculate rebates and provide them to candidates promptly.

(viii) Adopt a policy requiring that all rates found in all package plans sold to commercial advertisers be included in the station's calculation of the lowest unit rate.

(ix) No longer require stations to include in lowest unit charge calculations noncash merchandise incentives (*e.g.*, vacation trips). Bonus spots, however, must still be calculated into lowest unit charge.

(x) Require that fire sale rates be calculated as the lowest unit charge for all classes of time sold that air during the fire sale period, but restrict that calculation to the time period or program actually covered by the fire sale.

(xi) Continue the policy of prohibiting stations from increasing their rates during an election period unless the rate increase is an ordinary business practice.

(xii) Require stations to provide make goods prior to the election if the station has provided a time-sensitive make good to any commercial advertiser during the year preceding the 45- or 60-day election period. *All* make-good spots must be included in the calculation of the lowest unit charge.

(xiii) Continue the existing policy that, while there is no obligation to sell spots in a particular program to candidates, once a station has decided that it will sell spots in a program, daypart, or time period, it cannot inflate the price of the spot sold to a candidate beyond the minimum necessary to clear by claiming that all "preemptible time" is sold out.

(D) *Political File*. The Commission's current policies and Section 73.1940(d) will continue to provide adequate guidance to licensees concerning maintenance of a public political file.

5. Finally, the Commission has determined that the policies reflected in this *Report and Order* should serve as legally binding rules. We thus have codified new rules, as set out in Appendix B, to effectuate the policies enumerated in this proceeding. Henceforth, any staff and Commission interpretative rulings will also be made public in order to provide clear and consistent guidance to the public. To the extent that anything contained herein conflicts with prior rules or Commission policies (such as the 1984 *Primer*), the policies adopted herein are controlling.

II. REASONABLE ACCESS

6. As indicated above, Section 312(a)(7) of the Act requires stations to provide federal candidates "reasonable access" to their facilities. [11] As noted in the *NPRM*, in 1978, after notice and inquiry, the Commission concluded that additional formal rules regarding what constituted "reasonable access" would not help licensees because of the varying circumstances under which broadcasters and

[10] Section 315(b) of the Communications Act states:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed-- (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and (2) at any other time, the charges made for comparable use of such station by other users thereof.

[11] In the *NPRM*, we asked for comment on our earlier interpretation that Section 312(a)(7) does not apply to cable television systems. *NPRM* at paragraph 19. Few commenters addressed this issue. Those that believe Section 312(a)(7) should apply argue that growing cable penetration makes cable access increasingly important to candidates. In our view, however, the statutory language of FECA and its legislative history indicate that Congress never intended to apply reasonable access to cable television. We note, for example, that Section 312(a)(7) is in a license revocation provision of the Act, making it unlikely that Congress intended its application to nonlicensee cable systems. Moreover, even if Congress initially intended to apply reasonable access to cable, the amendment of FECA in 1974 established that reasonable access does not apply. In that 1974 legislation, Congress repealed Title I of FECA, containing the only statutory language arguably supporting Section 312(a)(7)'s

candidates operate. Instead, the Commission determined that it would continue to rely upon the reasonable, good faith judgments of its licensees to provide reasonable access. It did, however, articulate guidelines that would be applied to determine whether a particular licensee's judgment was reasonable. Subsequently, additional questions have been raised regarding standards for reasonableness, as outlined in the *NPRM*.

A. Formal guidelines for reasonable access for federal candidates.

7. *Issue and Comments.* The *NPRM* proposed to incorporate existing Commission guidelines on what constitutes "reasonable access" into a more formal scheme. The majority of commenters did not address this issue. Of the four that did, three asked for quantifiable access, i.e., a specific number of hours per week, or formulas that consider the market's various stations and populations. [12]

8. *Decision.* On further reflection, the Commission continues to believe that formal rules would not be practical and that we should continue to rely upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates. Reasonable access does not lend itself to a specific number of hours based on complex formulas. Rather, what constitutes "reasonable access" depends on the circumstances surrounding a particular candidate's request for time and the station's response to that request. We will thus continue to determine compliance with Section 312(a)(7) on a case-by-case basis.

9. In evaluating whether a particular licensee's judgment in affording access is reasonable, we will continue to rely on the following guidelines, which reflect a combination of policies articulated by the Commission in its 1978 *Report and Order* on reasonable access. [13] and approved by the Supreme Court in *Carter/Mondale:* [14]

a) Reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their "uses" of the station. *See Report and Order,* 68 FCC 2d at 1088.

b) Reasonable access must be provided at least during the 45 days before a primary and the 60 days before a general or special election. The question of whether access should be afforded before these periods or before a convention or non-primary caucus will be determined by the Commission on a case-by-case basis. *Id.* at 1091. [15]

c) Both commercial and noncommercial educational stations must make program time available to legally qualified federal candidates during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny access. *Id.* at 1090.

d) Commercial stations must make spot announcements available to federal candidates in prime time. The same rule applies to noncommercial stations that utilize spot time for underwriting announcements. Where a noncommercial educational station normally broadcasts spot promotional or public service announcements only, it generally need not make those spot times available to political candidates. *Id.* at 1092 and n. 22.

e) If a commercial station chooses to donate rather than sell time to candidates, it must make available to federal candidates free time of the various lengths, classes, and periods that it makes available to commercial advertisers. *Id.* at 1090 n. 18. [16]

f) Noncommercial stations may not reject material submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station. *Id.* at 1094.

g) A station may not use a denial of reasonable access as a means to censor or otherwise exercise control over the content of political material, *e.g.,* by rejecting it for nonconformance with any of the station's suggested guidelines. *Id.*

h) Licensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers. Noncommercial educational stations must provide program time which conforms to normal parts of the station's broadcast schedule. *Id.* at 1094.

i) In providing reasonable access, stations may take into consideration their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disrup-

---

applicability to cable. Thus, upon careful review of the statute, the relevant legislative history, and the comments received in this proceeding, we find no reason to alter the conclusion in *Subscription Video Services,* 51 Fed. Reg. 1821 n. 27 (1986), that Section 312(a)(7) does not apply to cable television.

[12] *See* comments of Greater Media at 3; Outlet Broadcasting at 1.

[13] *Report and Order,* 68 FCC 2d 1079 (1978).

[14] *Carter/Mondale Presidential Committee, Inc.,* 44 FCC 2d 631, *recon. denied,* 74 FCC 2d 657 (1979), *aff'd sub. nom. CBS, Inc. v. FCC,* 629 F.2d 1 (D.C. Cir. 1980), *aff'd.,* 453 U.S. 367 (1981).

[15] The Supreme Court has recognized the Commission's need to evaluate when access should be afforded on a case-by-case basis, and has also affirmed the Commission's use of objective criteria in a national campaign. Those criteria included the facts that: (a) a number of candidates had formally announced their intention to seek a nomination; (b) various states had begun their delegate selection process; (c) candidates were fund raising and making speeches across the country; and (d) national print media had already given campaign activities prominent coverage. After weighing these criteria, the Commission determined that access should be given 11 months before a presidential election and 8 months before the Democratic National Convention. *CBS, Inc. v. FCC,* 453 U.S. at 392.

[16] In its comments, the Federal Election Commission (FEC) notes that, in 1986, it initially approved an advisory opinion which would have prohibited corporate licensees' offering free advertising to candidates. That opinion, however, was later vacated when the FEC revisited the issue. The FEC vote on reconsideration was deadlocked at 3-3. The FEC points out that it is currently unable to offer guidance on this issue apart from its "advisory opinion" process. Under that procedure, an interested party would need to present its question in the form of a new advisory opinion request, and the FEC would then have the opportunity to further consider the issue. However, at this time there appears to be no FEC ruling which squarely prohibits advertising donations by corporations.

tion that will be caused by political advertising, and the amount of time already sold to a candidate in a particular race. *Id.* at 1090.

B. Access for state and local candidates.

10. *Issue and Comments.* The Commission requested comment on whether stations are required by law to make facilities available to state and local candidates for their "uses." The few commenters that address this issue all state that Section 312(a)(7) is distinct and more demanding than stations' general public interest obligation,[17] and that stations may satisfy any public interest obligations with respect to state and local elections through news and general public affairs programming. Unlike federal candidates' reasonable access, they state, the public interest standard does not accord state and local candidates any specific access rights.

11. *Decision.* The Commission will not require a specific right of access for non-federal candidates. Section 312(a)(7), the only access provision in the political broadcasting laws, is quite explicit in creating a right of "reasonable access" exclusively for federal candidates. [18] Thus, no statutory basis exists to create a right which Congress implicitly rejected.

12. Moreover, the Supreme Court has declined to extend the general public interest obligations of broadcasters to encompass specific access requirements. As the Court explained in *CBS, Inc. v. FCC*, under the "public interest" standard," an individual |non-federal| candidate can claim no personal right of access." [19] Indeed, except for the "reasonable access" required for federal candidates under Section 312(a)(7) and the "equal opportunities" that must be provided to all candidates once a "use" by an opponent has been broadcast under Section 315, Section 3(h) of the Act states that broadcast stations cannot be treated as common carriers with an obligation to accord access to any particular person, group, or entity.[20]

C. News Programming.

13. *Issue and Comments.* The *NPRM* requested comment on whether the Commission should keep its current policy that permits broadcasters the editorial discretion to determine whether political advertisements should be aired during news programming. The majority of commenters argue that licensees should retain their discretion to exclude political advertising from news programming.[21] Such parties contend that mandatory access may compromise the journalistic integrity of news programming and confuse the public. They also point out that Section 312(a)(7) affords federal candidates reasonable -- not extraordinary or mandatory -- access, and does not entitle them to specific placement or programs.[22]

14. By contrast, three media buyers argue that television news programming reaches the highest concentration of those likely to vote. Accordingly, limiting candidates' access to news curtails their access to voters.[23] These commenters also contend that voters are able to distinguish partisan messages from news programming.

15. *Decision.* The Commission will continue its policy of allowing broadcasters to ban the sale of political advertising to federal candidates during the news.[24] The preponderance of comments received on this issue support retention of this longstanding policy, based upon our conclusion that Section 312(a)(7) was never intended to provide candidate access to specific programming.[25]

16. Indeed, so long as a station makes available to candidates a wide array of dayparts and programs, access to news programming is simply not essential to afford "reasonable access." We continue to believe that allowing the station discretion to refuse to run political advertising within its news programming does not unreasonably hamper the access of federal candidates to broadcast time, but does serve the public interest by preserving the journalistic integrity of the licensee in this vital area of programming.[26]

17. As we concluded in 1978: "|A|lthough a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. We recognize that it would be very difficult for a licensee to afford 'equal opportunities' to opposing candidates if one candidate has his or her spot placed adjacent to a highly rated program, which was broadcast only once or very rarely. Additionally, there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day. It is best left to the discretion of a licensee when and on what date a candidates spot announcement or program should be aired." *Report and Order*, 68 FCC 2d at 1091. We reaffirm our longstanding policy in this *Report and Order.*

D. News Adjacencies.

18. *Issue and Comments.* The *NPRM* also asked for comment on the Commission's policy that prohibits stations from creating "news adjacencies" that are sold only

---

[17] The comments of AFB at 18-19; NBC at 10-11; Shamrock at 19,23; RTNDA at 5.

[18] As originally reported in the Senate, Section 312(a)(7) would have applied to any legally qualified candidate, but the Conference Committee expressly limited the provision to candidates seeking federal office. S. Conf. Rep. No. 92-580, p. 22, (1971); *See, CBS Inc. v. FCC*, 453 U.S. 367,380 (1981).

[19] 453 U.S. 367, 378-79, n. 6. (1981). Of course, once a broadcaster decides to sell or give time to a state or local candidate for political advertising, it is required to meet all of its statutory obligations including equal opportunities, lowest unit charge, and sponsorship identification.

[20] *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

[21] *See, e.g.*, the comments of ABC at 2-3; CBS at 21-23; INTV at 9-10.

[22] Comments of Dow, Lohnes and Albertson at 33.

[23] The comments of MPC at 2; National Media at 2; and Wilson at 3.

[24] Because state and local candidates have no right of access to broadcast facilities, stations may ban the sale of advertisements during news programming to such candidates regardless of the Commission's policy with respect to federal candidates.

[25] *See Report and Order*, 68 FCC 2d 1079, 1091 (1978); *Carter-Mondale Presidential Committee*, 74 FCC 2d 631, *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub nom. CBS, Inc. v. FCC*, 629 F.2d 1 (1980), *aff'd*, 453 U.S. 367 (1981).

[26] In this regard, we note that Congress generally has recognized the special status of news programming in the context of licensees' political broadcasting obligations. 47 U.S.C. Section 315 (a)(1)-(4).

to candidates at premium rates. [27] While the comments were mixed, more commenters state that news adjacencies should be considered as part of the news period and priced consistently with the lowest unit rate for the entire news period. [28] Apparently, this approach would be consistent with customary business practice. [29] Other commenters contend that the scheduling of news adjacencies is certain and precise, and therefore justifies a higher, premium rate. [30]

19. *Decision.* Based on the record compiled in this proceeding, we are persuaded that the scheduling attributes of news adjacencies may be sufficient to justify treating them as a separate class of time. We will permit sales of a "news-adjacency" class of time to candidates, however, *only* if such a class is sold at rates no higher than sales of such time to most-favored commercial advertisers. Thus, a station may charge no more for the news-adjacency class of time than the lowest unit rate charged to commercial advertisers during the news itself. We believe that this additional requirement, coupled with our disclosure requirements, will provide adequate safeguards against abuse.

E. Weekend Hours.

20. *Issue and Comments.* The Mass Media Bureau has previously noted that it does not require stations to make "extraordinary efforts" to remain open outside of normal business hours for the purpose of selling political advertising time.[31] However, if the station is formally closed but is otherwise open for purposes of "arranging and providing programming," the Bureau has stated that it may be unreasonable and inconsistent with the requirements of Section 312(a)(7) and 315(a) to deny access to political candidates on the weekend before the election.[32] The *NPRM* requested comment on the Bureau's policy that requires a station to afford "weekend" or "after hours" access to political candidates for placement and/or scheduling of advertisements on the weekend before the election if they would so treat their most-favored advertiser.

21. The majority of commenters oppose mandated weekend and after-hour access to stations for candidates in order to provide for the placement and/or scheduling of advertisements.[33] To require stations to accommodate candidates' requests outside normal business hours, several argue, presents staffing and financial hardships.[34] Moreover, several commenters argue that the Commission has erroneously extended Section 315(b) lowest unit charge provision's "most-favored commercial advertiser" considerations to non-rate related candidate benefits, such as weekend access.[35]

22. In contrast, Wilson claims that a station's political sales should mirror its commercial practices. Thus, if a station's most-favored commercial advertiser is afforded weekend/after hour access, so should candidates.[36] According to Dow Lohnes and Albertson, stations should only be required to accommodate federal candidates if they did so for a commercial advertiser within the 60 days preceding the statutory period.[37]

23. *Decision.* The Commission will require that stations provide access to federal candidates for purposes of "arranging and providing programming" the weekend before an election if they have so accommodated any commercial advertiser during the previous year. Regardless of how a station treats its "most-favored advertiser," if it has provided weekend access for any commercial advertiser during the year preceding the election, then it is "reasonable" for federal candidates to expect similar treatment.[38]

III. EQUAL OPPORTUNITIES

24. Section 315(a) of the Communications Act provides that if a broadcast station permits any legally qualified candidate (federal, state or local) to "use" its station, the licensee is required to provide equal opportunities to all other candidates for the same office to "use" the station. The Commission has held that the candidate "use" that triggers equal opportunities is an appearance by the candidate by voice or picture in which the candidate is identifiable to the audience.[39] Section 315(a) further stipulates that the licensee shall have no power of censorship over material broadcast pursuant to these requirements.

25. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from the equal opportunity requirements appearances by legally qualified candidates in the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a).

---

[27] News adjacencies are the commercial breaks immediately preceding or following a news program.

[28] *See generally* comments of Busse at 3-4, CBS at 21-23.

[29] One media buyer states that news adjacencies should be treated as "swing breaks," which are sold as part of the higher rated program, consistent with normal business practices. National Media's comments at 2.

[30] The comments of Covington and Burling at n. 14 and n. 24; Osborn at 13.

[31] Letter Ruling released July 3, 1990 (DA 99-871).

[32] *Id.*

[33] *See, e.g.,* the comments of CBS at 23-25; Cox at 11-12; NAB at 18-19.

[34] *Id.*

[35] The comments of CBS at 23-25; Dow Lohnes and Albertson at 15; NBC at 12-14.

[36] Wilson at 3.

[37] Dow, Lohnes and Albertson at 15.

[38] Furthermore, a licensee that affords weekend access to state and local candidates must do so on a non-discriminatory basis.

[39] *1984 Political Primer,* 100 FCC 2d at 1489.

A. Bona Fide Newscast Exemption.

26. *Issue and Comments.* The *NPRM* asked for comment on the extent to which a licensee must have control over the production of a bona fide newscast in order for it to be exempt from equal opportunities under Section 315(a), and the criteria for establishing such control. The majority of commenters support the Commission's decision in *Oliver Productions, Inc.*, 4 FCC Rcd 5953 (1989), *appeal dismissed sub nom., TRAC v. FCC*, 917 F.2d 585 (D.C. Cir. 1990), in which the Commission concluded that the absence of complete licensee control over a newscast's production does not exclude application of the statutory exemption from equal opportunities. [40] These commenters state that the news exemptions depend on the nature of the programming, not the source of production. To qualify as a bona fide newsexempt program, they argue, the selection of material should be based on legitimate news judgments and not be designed to advance any particular candidacy. They also point out that licensees exercise reasonable news judgments in acquiring and airing the material, and are ultimately responsible for all their programming. Further, they argue that a narrow interpretation would inhibit the free flow of information and curtail diversity.[41]

27. In opposition, TRAC argues that *Oliver Productions* should be expressly overruled. TRAC contends that to qualify for a news exemption, programming must be subject to full licensee editorial control.[42] According to TRAC, full editorial licensee control means that a licensee should supervise production or retain the right to refuse to air programming if it so decides, without contractual limitations. Such control is necessary, TRAC argues, to protect the electoral process from abuse, because while licensees must answer to the FCC, independent producers are not accountable to anyone. Additionally, TRAC defines a newscast as a multi-faceted news program with timely segments.[43] TRAC argues that inclusion of a newscast segment in a non-exempt program does not warrant exemption. [44]

28. INTV, PBS and RTNDA object to TRAC's standard of unhindered licensee editorial control. They state that such a requirement would undermine the purpose of the news exemptions by discouraging, rather than facilitating, election coverage.[45] Moreover, PBS and RTNDA regard TRAC's analysis as unrealistic, particularly with respect to late-breaking and "live" news coverage of interviews.

29. *Decision.* We continue to believe that a determination of whether a program qualifies as a *bona fide* newscast should be judged solely on the basis of whether the program reports news of some area of current events in a manner similar to more traditional newscasts.[46] Regarding TRAC's concern that this view will lead to abuse because we have no jurisdiction over third parties who may have produced the news segments, we of course note that we have jurisdiction over the licensee itself, the party ultimately responsible for exercising editorial control in determining whether or not to air the program. Thus, we believe that, for purposes of the newscast exemption, the exercise of such control will alleviate this concern. Third-party produced newscasts featuring candidates not for their *newsworthiness*, but to promote a particular candidacy, will not be viewed as qualifying for the exemption Congress set forth for a *bona fide* newscast. Regardless of any contractual obligations the station may have to the third party, if a station chooses to air such programming for the purpose of promoting a particular candidacy, it must comply with the equal opportunity requirements of our rules and the Act.

B. "Uses" under Section 315(a).

30. *Issue and Comments.* As noted above, the Commission currently defines a "use" by a "legally qualified candidate" under Section 315(a) as any "positive" appearance of a candidate by voice or picture. The Commission staff has advised licensees that, in the event a candidate's name or picture is used by opponents in an advertisement in a disparaging manner, such appearance of the candidate is not a "use" and does not therefore trigger the equal opportunities clause.[47] In contrast, if any unauthorized third-party advertiser or programmer uses a picture or other depiction of a candidate to *endorse* that candidate, even if the candidate considers such an endorsement to be harmful because of the identity of the advertiser, such appearance is still considered a "use" that would trigger the equal opportunity provision. Current policy permits licensees to adopt a policy of selling time only to authorized spokesparties for any candidate. However, once a station permits a "use" by an unauthorized third party, the equal opportunities clause is triggered. We sought comment on these policies in the *NPRM*.

31. Spurred by the rash of recent negative campaign advertisements, several commenters request that the Commission clarify or modify the definition of "use." Many suggest that "uses" be restricted to programs and announcements that are either paid for or authorized by the candidate (or his campaign committee).[48] Such a simplified definition, they argue, will ease Section 315 administration, preserve candidates' campaign strategies, and avoid stations' subjective assessment of announcements'

---

[40] *See generally*, the comments of CBS at 25-27; Dow, Lohnes and Albertson at 36; Koteen and Naftalin at 38-41.

[41] Koteen and Naftalin, PBS, and RTNDA argue that this rationale should be extended to news interview programming. Koteen and Naftalin at 3841; PBS at 3; reply comments of RTNDA at 2-5. We believe that the arguments raised in these comments may warrant further consideration. We specifically stated in the *NPRM*, however, that such matters were beyond the scope of the proceeding. *NPRM* at fn. 39. Thus, we invite interested parties to file a petition for declaratory ruling on this issue, which will give the public adequate opportunity to comment so that we can evaluate this issue based upon a complete record.

[42] TRAC's comments at 3-9; TRAC's reply comments at 4-7.

[43] Comments of TRAC at 10-13.

[44] TRAC argues that this factor distinguishes the program in *Oliver Productions* from other programs such as "Nightline." In "Nightline," the newscast segment is not a bona fide newscast; rather, its exempt status is due to its integration with an exempt news interview program. Comments of TRAC at 19-22.

[45] The reply comments of INTV at 5; PBS at 4; RTNDA at 5.

[46] *Oliver Productions, Inc.*, 4 FCC Rcd 5953, 5954 (1989).

[47] The FCC staff has advised licensees accordingly, relying upon a report it gave to Congress in 1981. *See Report of the Staff of the Federal Communications Commission on the Operation and Application of the Political Broadcasting Laws During the 1980 Political Campaign*, submitted to Senator Barry Goldwater in 1981.

[48] *See, e.g.*, the comments of Cox at 29; Dow, Lohnes & Albertson at 7; reply comments of NCAB at 22-24.

content and impact.[49] In this connection, Group W and NCAB request that the Commission reiterate that licensees are not obligated to sell airtime to entities not authorized by, or related to, candidates.

32. In contrast, only one commenter argues that any appearance by a candidate should constitute a use, given the potential for candidate abuse. INTV contends that if the Commission restricts "uses" only to appearances authorized by candidates, candidates could collude with, and channel money to, independent entities whose uses would not trigger the equal opportunities requirement, thereby denying the candidate's opponents' requests for time.[50]

33. *Decision.* We have decided to narrow our interpretation of "use" under Section 315(a) to include only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate (or the candidate's authorized committee) after the candidate becomes legally qualified.[51] In doing so, we note that Section 315 is limited specifically to "uses" by a "legally qualified candidate." At the very least, then, the plain language of the statute suggests the candidates' tacit approved participation in the broadcast. Moreover, the legislative history of Section 18 of the Radio Act, which preceded Section 315, indicates that Congress primarily was addressing candidate-initiated appearances and speeches when enacting the equal opportunities requirement.[52] Similarly, in considering the 1959 news exemptions amendment, various legislators also expressed the view that "use" was directed only to candidate-initiated appearances.[53] Thus, the relevant legislative history of Section 315(a) supports a narrower interpretation of the term "use" as well.

34. Under our narrower interpretation, if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities. In these circumstances, the candidate controls his appearance on the air and therefore is properly viewed as having "used" the station's facilities. By contrast, if a legally qualified candidate does not voluntarily appear in a non-exempt broadcast, such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, his appearance would not constitute a use.[54]

35. As a practical consequence, this interpretation will have the effect of overruling decisions such as *Adrian Weiss,* 58 FCC 2d 342, *review denied,* 58 FCC 2d 1389 (1976), where the Commission upheld a Bureau determination that the broadcast of Ronald Reagan motion pictures during applicable campaign periods would constitute a "use" for purposes of Section 315. While President Reagan voluntarily appeared in the films when they were made, any control over when or whether the films were broadcast ended prior to his becoming a legally qualified candidate. Thus, under our new interpretation, such broadcasts would not be Section 315 "uses" by a "legally qualified candidate."[55]

36. However, if a legally qualified candidate voluntarily appears or otherwise consents to an appearance during the applicable campaign periods, such appearances would constitute a Section 315 "use." Thus, for example, a voluntary appearance on a live entertainment program during a campaign period would constitute a "use."[56] Likewise, the voluntary appearance of announcers, newscasters, interviewers, commentators and other talent would be deemed a Section 315 "use."[57] In each case, however, whether a "use" has occurred depends upon whether the appearance is voluntary (*i.e.,* under the candidate's control) after he or she has become a legally qualified candidate.[58]

---

[49] The comments of Group W at 8; the reply comments of NCAB at 23.

[50] Comments of INTV at 11.

[51] Our ruling herein does not in any way affect news programming that is statutorily exempt pursuant to the provisions of subsections 315(a)(1)(4). Congress has directly addressed the circumstances in which such news programming falls outside the equal opportunities requirement. As to these programs, we shall continue to be guided by the explicit standards set out in the statute, the legislative history, and court and Commission precedents. For example, to qualify for the exemption, the news programming at issue must still be "bona fide" (*i.e.,* must be of genuine news value and not designed by the broadcaster to advance any particular candidate). *See,* Conference Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959); 105 Cong. Rec. 14442 (Pastore); *id.* at 16224 (Brown); *id.* at 17828 (Pastore); *id.* at 17777 (Scott). Additionally, news interview programs must still be regularly scheduled and licensee-controlled, and news documentaries must still focus on matters other than the candidate.

[52] *See* 67 Cong. Rec. 12502-12504.

[53] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 6 (1959)(remarks of former Senator Dill, who sponsored the original legislation in the 1927 Radio Act); *See also* Cong. Rec. 16244 (Brown) and 14442 (Pastore).

[54] Independent entities that oppose or support candidates do not have any access rights; only federal candidates are accorded access rights. Thus, licensees are not required to accept any political material that is not authorized by candidates. In this connection, we note that several commenters expressed the belief that the lowest unit charge provision currently applies to "uses" sponsored by independent entities. Even under our prior broader interpretation of "use," however, we have never held that independent entities were entitled to the lowest unit charge. The legislative history of Section 315(b) clearly demonstrates Congressional effort to reduce *candidates'* escalating campaign costs. *See* S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971). Therefore, we reiterate that the lowest unit charge inures to the benefit of candidates only.

[55] The Commission, of course, retains the discretion to revisit these rules if abuses become apparent. As stated, we believe the approach outlined above more closely comports with both the plain language and intent of the Act. If, however, the accomplishment of Congress' objectives under the political broadcasting provisions is not enhanced under this approach, we will respond accordingly.

[56] *See Paulsen,* 33 FCC 2d 835 (1972); *aff'd sub nom. Paulsen v FCC,* 491 F.2d 887 (9th Cir. 1974).

[57] For examples of candidate appearances that will continue to be considered uses, *see RKO General, Inc.,* 25 FCC 2d 117 (1970) (daily interview host); *Station WBAX,* 17 FCC 2d 316 (1969) (station announcer); *KUGN* 40 FCC 293 (1958) (broadcaster's occasional appearances).

[58] Public Broadcast Licensees also argue that the Commission should clarify that where candidate A appears by invitation in another candidate's program or advertisement, candidate A's appearance is not a use and does not create equal opportunities for his opponents, since candidate A did not "control" the use. Joint Comments of Public Broadcast Licensees at 11-12. We believe, however, that if a candidate chooses to appear on another candidate's advertisement, the appearance is voluntary and thus constitutes a "use" under Section 315(a).

37. We believe that defining "use" in terms of an appearance that is controlled, sponsored, or approved by a candidate should simplify administration of Section 315. In determining the applicability of Section 315's no censorship provisions, for example, the candidate, s control, approval, or sponsorship, or lack thereof, would be dispositive. Such a determination may readily be ascertained and does not necessitate any review of the broadcast material. Additionally, a narrower definition of use ensures candidates greater control of their campaigns by attributing to them only those messages or associations they authorize or approve.

38. Finally, we are not persuaded by the argument that a narrower definition of use will result in "collusion" between candidates and independent groups. This concern is purely speculative. Moreover, FECA expressly requires that political advertising clearly state who pays for a political advertisement and whether or not it was authorized by a candidate. 2 U.S.C. Section 441(d). Thus, federal candidates or committees that attempted to collude by channeling money to independent groups without an appropriate announcement would violate federal law.[59] Further, given the fact that only candidates are entitled to lowest unit charge benefits, *see* n. 55, *supra*, we think it is highly unlikely that candidates will be motivated to channel scarce resources to independent groups.

C. Sponsorship ID Guidelines.

39. Section 317 provides generally that the identity of the party providing consideration (*i.e.*, paying) for broadcast material must be disclosed on the air at the time of broadcast. The Commission has determined previously that it is not practical to adopt quantifiable standards to govern the sponsorship identification requirements contained in this provision and codified in Section 73.1212 of our rules. *Sponsorship Identification Requirements*, 41 RR2d 761 764 (1967). Rather, we have generally advised that the sponsorship announcement must be displayed in letters of sufficient size to be legible to the average viewer; set against a background that does not reduce the announcement's legibility; and exhibited on the screen for a sufficient amount of time to be read in full by the average viewer.[60] The Commission has applied these criteria to sponsorship identifications involving both political broadcasts and commercial matter.[61]

40. There are, however, additional requirements for political announcements that are designed to make information about their sponsors more available to the public. Sections 73.1212(d) and (e) of the rules require that: 1) licensees retain lists of information regarding the political sponsors' identity for public inspection; and 2) announcements be made both at the beginning and the end of political material five minutes or more in length. *See Amendment of Sponsorship Identification Requirements*, 52 FCC 2d 701 (1975).

41. The Commission has also made clear that "liability for incorrect sponsorship identification rests with licensees."[62] As a consequence, licensees may "require that proposed [political] broadcasts" contain appropriate sponsorship announcements. The Commission has characterized this as an exception to the no censorship provision set forth in Section 315(a), which otherwise precludes stations from influencing the content of political broadcasts. [63] In identifying the appropriate sponsor of the political material, however, licensees are only required to exercise reasonable diligence. [64]

42. *Issue and Comments.* The *NPRM* proposed adoption of objective guidelines that could be used by stations to assess whether a paid political broadcast complies with the sponsorship identification requirement. In particular, it proposed that letters equal to or greater than 4% of picture height, to air for not less than six seconds, should be required for video identification. It further proposed that a clearly audible statement at the beginning and end of the message, setting forth the name of the sponsor, should be required for audio identification.

43. The majority of commenters support, or do not oppose, [65] adoption of objective sponsorship identification standards.[66] According to Koteen and Naftalin, objective standards will better inform the public of the sponsor of political broadcasts -- a public interest benefit that is made all the more necessary, they claim, given the negative campaign climate. [67] In contrast, CBS, Group W, NAB and NCAB oppose the adoption of quantitative criteria. [68] NAB contends that such standards will require licensees to make precise measurements, which are difficult to calculate. [69] CBS agrees with NAB, and further states that the proposed criteria would be unnecessarily restrictive and may substantially curtail candidates' political presentations. [70] Moreover, several commenters argue that the

---

[59] Indeed, in order to qualify as an "independent expenditure" that supports or opposes a candidate under FECA, the expenditure cannot be made in "cooperation or consultation" with any candidate, any authorized committee, or agent of such candidate. 2 U.S.C. Section 431 (17).

[60] *Id.* at 763. With respect to television, the Commission stated that announcements could be aural or visual. *Id.*

[61] *See Lotus Broadcasting Co.*, 10 RR 2d 921, 923 (1967); *Amendment of Sponsorship Identification Rules*, 34 FCC 829, 848-49 (1963). *See also, National Broadcasting Co.*, 20 RR2d 901, 903 (1970), in which the Commission applied the same size and length criteria for political sponsorship announcements to sponsors of cash and prizes awarded on game and audience participation shows.

[62] *See Joint Agency Guidelines for Broadcast Licensees*, 69 FCC 2d 1129, n. 2 (1978).

[63] *Id. See also, KOOL-TV*, 26 FCC 2d 42 (1970) ("A Lot of People Who Would Like To See Sam Grossman Elected To The U.S. Senate" failed to represent that this was a committee, and thus lacked the specificity necessary to comply with Section 317).

[64] *See Voter*, 46 RR 2d 350, 352 (1979).

[65] *See, e.g.*, the comments Busse at 4; FEC at 3-5; Group W at 9-10; PAW/MAP at 21-24.

[66] MPC states that sponsorship identifications should appear both at the beginning and end of radio announcements. MPC Comments at 4.

[67] Koteen and Naftalin's comments at 41-42.

[68] Group W's comments at 9-10.

[69] NAB's comments at 20-22. NCAB also states that the new standards will be difficult for licensees to implement and enforce.

[70] CBS' comments at 29-30.

burden of compliance should be imposed on the candidates and enforced by the Federal Election Commission ("FEC") -- not licensees or the Commission. [71]

44. *Decision.* After carefully reviewing the record, we are not persuaded that we should adopt specific, objective criteria for meeting sponsorship identification obligations. We are concerned that specific requirements, such as those proposed in the *NPRM*, would place undue burdens upon licensees and would interfere with candidates' ad design and preparation. Thus, we favor maintaining flexibility for both broadcasters and candidates, and will continue to rely upon the licensees' reasonable, good-faith judgment as to whether a particular sponsorship identification meets the statutory requirements.

45. We note, however, that broadcasters must be mindful of the importance of assuring that the audience is able to discern the sponsor of a paid political broadcast. Thus, while no specific, quantifiable standards will be established, we will continue to require that the sponsorship identification for television must be sufficiently large, and of sufficient length on radio and television, to allow members of the audience to reasonably comprehend the identity of the sponsor. Moreover, although we decline to make them mandatory, we believe that the specific requirements outlined in the NPRM (and described above in paragraph 40) would be sufficient to satisfy the statutory mandate.

D. Audio and Visual Identification.

46. *Issue and Comments.* The *NPRM* also sought comment on its proposal to require both audio and visual identification for television advertisements. Several commenters addressing this issue supported this proposal.[72] NAB, on the other hand, described the visual and aural requirement as overreaching, particularly given the non-emergency nature of political messages.[73]

47. *Decision.* The Commission will adopt the proposed policy of requiring both audio and visual identification for political advertisements carried by television stations. We believe that this requirement will better inform those persons suffering from aural or visual impairments. In addition, the requirement will convey the sponsor's identity to viewers listening, but not actually watching a program, or those receiving programming from the class of radios that has been specifically designed to receive the audio portion of television programs.

E. Pre-Airing Submissions.

48. *Issue and Comments.* Current Commission policy does not *require* candidates to submit their political broadcasts to stations before airing so that the station can determine whether the broadcast complies with the sponsorship ID rules. Most commenters argue that, if we were to adopt objective sponsorship identification standards, those standards must be coupled with a right by the station to preview candidate material to ensure compliance. ABC explains that fairness and effective enforcement necessitate such preview rights, particularly since the proposed standards require screen size and time duration calculations. [74] In this connection, several commenters specify time periods in which licensees should be permitted to require candidates to furnish material in advance of the scheduled airtime. [75] Additionally, Public Broadcast Licensees state that licensees should be able to refuse material that does not conform to the sponsorship identification standards. [76]

49. *Decision.* In view of our decision not to require sponsorship identification announcements to meet specific regulatory criteria, we do not believe it is necessary to adopt a policy which *requires* pre-airing submissions. Such a policy would be difficult to implement and could result in improper station involvement in the timing and content of political broadcasts. We will, however, continue to enforce our current policy, which permits broadcasters to ask for pre-airing submissions to determine compliance with technical standards, including compliance with sponsorship ID requirements. If a candidate nonetheless refuses to allow a broadcaster to pre-screen an ad, the licensee should presume that it must provide its own sponsorship identification or risk violating the Act and our rules.[77] We emphasize, however, that, consistent with the Commission's traditional approach, we are not requiring licensees to provide additional time, free of charge, to add the required sponsorship ID. Rather, the broadcaster may choose whatever means are appropriate to ensure sponsorship ID compliance.

IV. LOWEST UNIT CHARGE

50. Section 315(b) of the Communications Act directs broadcast stations and cable television systems to charge political candidates the "lowest unit charge of the station" for the same class and amount of time for the same period, during the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. Congress added Section 315(b) in 1972 as part of a plan "to give candidates for public office greater access to the media and... to halt the spiraling cost of campaigning for public office." [78] By adopting the lowest unit charge requirement, Congress intended to place candidates on a par with a broadcast station's most-favored advertiser.[79]

A. Obligation to Make Rates Available.

51. *Issue and Comments.* Broadcasters currently have a duty, under Section 73.1940(b), to make all discount rates and privileges offered to commercial advertisers available to candidates. As we stated in the *Notice*, we believe that

---

[71] *See, e.g.* the comments of CBS at 29-30; Dow Lohnes and Albertson at 38; NAB at 20-22.

[72] *See, e.g.*, comments of FEC at 4; Gillett at 8-9.

[73] *See also*, NCAB Reply at 25.

[74] ABC's comments at 3-6.

[75] Public Broadcast Licensees also state that candidates should be required to furnish in advance written scripts for "live" announcements, to enable licensees to ensure compliance. *Id* at 5.

[76] Joint Comments of Public Broadcast Licensees at 6.

[77] We note that the NAB form contract for political advertising specifies that broadcasters are authorized to include appropriate sponsorship ID.

[78] S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. 7 Ad. News 1773, 1774.

[79] *Id.* at 1780.

this duty contains two obligations: an affirmative duty to disclose to candidates information about rates, make goods, and discount privileges offered commercial advertisers; and an obligation to sell to candidates all types of discount privileges made available to commercial advertisers.

52. In the *NPRM* we sought comment upon the scope of the affirmative disclosure obligation. Almost all commenters agree that some form of mandatory disclosure requirement is reasonable, and most request specific guidance on what must be done to satisfy such an obligation. Pulitzer argues that the Commission should leave the method of disclosure to the discretion of the licensee to assure maximum flexibility and that the FCC should adopt a policy of relying generally on the reasonable good faith judgment of licensees.[80] Numerous commenters request that the Commission adopt a standard disclosure report form or specify exactly what information must be conveyed to meet the obligation.[81]

53. Many commenters suggest that the amount of disclosure required should be tailored to the needs of the buyer. They maintain that more sophisticated buyers -- who would often include political time buyers -- would not need as much repetitious disclosure. [82] MPC disagrees, and states young and inexperienced. [83] INTV suggests that disclosure statements should not be required to include every conceivable package or option, but that the Commission could adopt a general rule that prohibits stations' use of selling techniques that obscure the availability of less expensive types of spots for candidates. [84]

54. Numerous commenters emphasize that there was no disclosure obligation prior to the *1990 Audit Report*. They contend that the only requirement "implicit" in the LUC obligation was that broadcasters act in good faith. [85] Thus, many commenters request that the Commission make an explicit finding that, prior to 1990, there was no required affirmative course of conduct with respect to disclosure. [86] Conversely, Kahn and Jablonski argue that ever since Congress enacted the lowest unit charge provision, broadcasters have had an affirmative obligation to disclose to candidates all discounts and options given to the most-favored commercial advertiser. They contend that the fact that the industry has developed an official position now demonstrates that broadcasters as a group have been collaborating to avoid the spirit and intent of the law. [87] They emphasize that without disclosure, "the statute is meaningless." [88]

55. *Decision.* The Commission believes that broadcasters must disclose and make available to candidates all discount privileges available to commercial advertisers, including the lowest unit charges for the different classes of time sold by the station. This requirement serves to ensure that candidates are able to avail themselves of their statutory rights and are not steered to purchase more expensive categories of time. Candidates must have full information about the discount privileges made available with various classes of time in order to ensure parity of treatment with commercial advertisers. [89]

56. Political broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to offer candidates the benefits of the lowest rates and any associated discount privileges for the various classes and lengths of time and time periods. It is thus incumbent upon the broadcaster to disclose to candidates all information concerning the lowest unit charges made available to commercial advertisers, together with the discount privileges associated by the broadcaster with those rates. The absence of such full disclosure hampers candidates' ability to evaluate what is being made available to them and is inconsistent with Congress' intent to place candidates on par with favored commercial advertisers. Indeed, the benefits of disclosure not only were underscored in the comments but were also made clear in the Commission's 1990 political audit. In a number of instances, the Commission noted that lowest unit charge issues arising from the audit stemmed in large measure from incomplete disclosure to candidates of individual stations' commercial sales practices. [90]

57. As noted *infra*, discount privileges afforded favored commercial advertisers include all sales practices which affect rates.[91] These include priorities against preemption,[92] time-sensitive make goods, [93] and any other privilege which essentially adds value to the spot purchased. Thus, in addition to disclosing to candidates the rates offered commercial advertisers for the various classes of time, broadcasters must also disclose all pertinent information about the privileges associated by the broadcaster with the rates.

---

[80] Pulitzer comments at 15. Kahn and Jablonski respond that "there is nothing in the history of political broadcasting to suggest that there is any intention [on the part of broadcasters] to act in good faith." Kahn and Jablonski Reply at 10.

[81] *See, e.g.*, comments of AFB at 42; Covington and Burling at 27; Shamrock at 9.

[82] Comments of Fox at 4-5; Cox at 16; Covington and Burling at 9; Dow Lohnes and Albertson at 15; NBC at 41. AFB contends that the fact that fixed or non-preemptible time is purchased through the use of sophisticated advertising agencies "confirms that candidates are not's teered' to fixed time, but purchase such time as a matter of their own informed choice." AFB Reply at 7.

[83] MPC comments at 2.

[84] INTV comments at 14-15.

[85] *See, e.g.*, ABC comments at 9. ABC acknowledges, however, that a fact pattern demonstrating a pattern of deliberate concealment of rate options or steering would not be consistent with "good faith." *Id.*

[86] *Id.*

[87] Kahn and Jablonski comments at 5-6.

[88] Kahn and Jablonski Reply at 6. *See also* Pulitzer comments at 14 (agreeing with Commission's position that disclosure is inherent in the LUC obligation).

[89] However, we recognize that neither the Commission nor the Mass Media Bureau had articulated the disclosure requirement before September 1990.

[90] *See, e.g.*, Letters of December 12, 1991, to KGO Television, Inc.; KDFW-TV, Inc.; TVX Broadcast Group, Inc.; and Chronicle Publishing Company, all of which were adopted contemporaneously with this *Report and Order*.

[91] *See* discussion para. 61, *infra*.

[92] Preemption priorities are any hedges against the likelihood of preemption.

[93] Make goods are the spot announcements rescheduled as a result of technical difficulty or preemption.

58. We understand that implementation of the disclosure requirement is complicated by the divergent sales practices in the industry, the rapid changes in such practices, and the proliferation of individually negotiated packages and rates. We believe that, in light of the vast array of approaches to the sale of time, a Commission-sanctioned "disclosure form" would be impractical. The more reasoned approach would be to afford each "broadcaster the reasonable discretion to decide how best to disclose its particular practices. However, we believe that, at a minimum, this disclosure should include:

(a) a description and definition of each class available to commercial advertisers which is complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(b) a complete description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(c) a description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(d) an approximation of the likelihood of preemption for each kind of preemptible time; and

(e) an explanation of the station's sales practices, if any, that are based on audience delivery.

Finally, once disclosure is made, stations must negotiate in good faith to actually sell time to candidates in accordance with this disclosure.

59. While the method of disclosure is left to the discretion of individual stations, we believe that broadcasters can meet the disclosure obligation by reducing their sales practices, as noted above, to some kind of outline format that briefly describes the various rates and discount privileges available at the station. For example, a station need not list every rotation offered by the station, but must make clear that other rotations are available upon request if that is the case. [94] In addition, since our policies now require stations to include all negotiated package rates in their lowest unit charge calculations, *see* para. 93, *infra*, every individually negotiated deal does not need to be disclosed. We also understand that time is of the essence in the context of an election campaign. Accordingly, after a licensee has once made full disclosure to a particular candidate or the candidate's representative during a given campaign, full disclosure need not occur each time a buy is made, although any changes in rates or other information that may arise subsequent to the initial disclosure (or subsequent candidate transactions) must be disclosed during each succeeding negotiation.

60. Finally, we understand that candidates or their representatives may wish to pursue specific purchase objectives with regard to a station and may not wish an oral or written catalogue of available rates. Clearly, a station cannot compel candidates or their representatives to read or listen to a presentation of rate packages. Rather, it is sufficient that the station attempt to inform candidates of its sales practices in accordance with the requirements set forth above.

B. Most-favored advertiser.

61. *Issue and Comments.* In response to our *NPRM*, several commenters argue that the most-favored advertiser standard applies only to rates and that Commission policies should not force stations to apply the concept to other station sales practices, such as make goods and preemption priorities. NBC and Cox state that the purpose of the 1972 amendments enacting the LUC provision was to place the candidate on par with a broadcast station's "mostfavored commercial advertiser" with respect to advertising rates. [95] CBS argues that the notion of a most-favored commercial advertiser originally contemplated volume discounts in an era when time was sold at stable prices. Now, however, the concept of a most-favored commercial advertiser is a fiction because advertiser advantages are dispersed in a wide variety of ways beyond price discounts. [96] Cox contends that the Commission's interpretations of benefits that must accrue to candidates are now based on a composite picture of the most-favored commercial advertiser, and that no single advertiser would ever receive all the advantages that candidates must receive through the Commission's "cherry-picking" of benefits given to all commercial advertisers. [97] Thus, these commenters argue, the effect of the Commission's current policy is to afford candidates greater benefits than those actually conferred upon the "most-favored commercial advertiser."[98]

62. Conversely, Kahn and Jablonski argue that Section 315 was intended to put candidates on a par with the most-favored commercial advertiser, and thus, candidates should receive all of the same benefits. They observe that, for the most-favored commercial advertiser, class-of-time distinctions are "rare," preemption is extremely unlikely, timely make goods are provided, preemptions are not based exclusively upon price, and rates are guaranteed over the long term. [99] They argue that candidates should receive similar treatment. Moreover, they argue, for a major advertiser, stations do not sell time on a true auction basis -- the major advertisers who pay lower volume prices will not get preempted if they object or are in the late stages of a buy, and, thus, higher priced spots for other advertisers are more likely to be preempted. Thus, Kahn and Jablonski assert, candidates should receive the preemption treatment given to the most-favored advertiser, not the station's "usual" preemption policy. [100]

63. *Decision.* We believe that we should continue to apply the most-favored advertiser standard not only to the advertising rates themselves but also to station sales prac-

---

[94] By the same token, stations need not disclose which commercial advertisers are getting which rates; rather, it is sufficient merely to disclose the rates themselves.

[95] NBC comments at 25.

[96] CBS comments at 4.

[97] Cox comments at 15.

[98] *See, e.g.*, the comments of Cox at 15; CBS at 4-5; NBC at 25.

[99] Kahn and Jablonski comments at 17.

[100] *Id.* at 11, 15.

tices and other discount privileges that improve the value of the spot to the advertiser. These would include make goods, preemption priorities, and any other factors that enhance the value of a spot. These characteristics effectively determine the particular class of time at issue. Hence, they must be disclosed and made available to candidates at the LUC. Even if it were true that no *single* advertiser would ever receive all such benefits (a conclusion some commenters dispute), nonetheless we believe that, because all such factors enhance the value of a particular class of time and improve the value of individual spots (even though the price itself does not necessarily reflect such value), each such benefit must be made available to candidates. Any other approach would be inconsistent with the statute's express directive that candidates be charged no more than the station's most-favored advertiser for the "same class" of time.

C. Classes of Time.

64. *Issue and Comments.* Section 315(b) of the Communications Act requires that stations charge candidates, during the 45-day period preceding a primary and the 60 days preceding a general election, no more than the lowest unit charge for the same class and amount of time for the same period. Regarding classes of time, the Commission historically has stated that "fixed" [101] or "non-preemptible," [102] "preemptible with notice," [103] and "run-of-schedule" [104] constitute separate classes of time. [105] In addition, current Commission policy provides that there is only one class of "immediately preemptible" time for lowest unit charge purposes. [106] The NPRM sought comment on whether it is lawful to have more than one class of immediately preemptible, preemptible-with-notice, and non-preemptible time.

65. *Preemptible Time.* Several commenters argue that the Commission's decision, announced in the *1988 Public Notice*, [107] to treat all immediately preemptible time as a single class of time confers extra benefits upon candidates not intended by the statute. [108] Moreover, some commenters point out that this decision was made without the benefit of public comment. [109] Greater Media, for example, argues that it is not fair to require stations to give refunds to candidates if any other preemptible rate clears at a lower rate during the same time period. Greater Media notes that the advertiser placing the lower-priced spot took a greater risk of not clearing than the political candidate, and the spot was priced accordingly. By requiring a rebate, the candidate is achieving a higher preference against preemption without having to pay for it.[110]

66. The vast majority of commenters contend that evolving sales practices have significantly complicated the calculation of the LUC. They seek flexibility in creating classes of time, made available to both commercial and political advertisers, so that they can adapt to individual market demands.[111] Most argue that the disclosure requirements will protect candidates against any manipulation of rates resulting from allowing broadcasters to create separate classes of time. [112] Thus, the commenters generally suggest that the Commission should allow flexibility in creating classes of time, require full disclosure, and articulate a general rule that stations cannot use class distinctions to defeat the purpose of the LUC requirement. [113] With respect to this latter point, the parties assert that candidates should continue to be allowed to challenge classes viewed as manipulative or discriminatory. [114]

67. NBC argues that each succeeding price increase in immediately preemptible time should be treated as a separate class for LUC purposes. [115] Other commenters contend that "class of time" is a function of two interrelated attributes: preemptibility and spot location. [116] A change in either attribute affects the desirability to the advertiser of the particular spot (demand) as well as the availability of time slots for it (supply), and thus is reflected in the price. The broader the time periods (spot location parameters) selected by the advertiser, the lower the value of the spot to the station because the licensee has increased flexibility in scheduling it. The commenters outlining these principles argue that the effect of such attributes should not be ignored when identifying appropriate "classes" of time. [117]

---

[101] Fixed or fixed position connotes the guarantee of placement during a particular time (*e.g.*, the spot will run at the 6:45 p.m. break, Wednesday, January 1, 1992).

[102] Non-preemptible connotes any spot which is not subject to preemption during a particular daypart, program or time period. By comparison to a fixed position, non-preemptible may run anywhere during the designated program, daypart or time period.

[103] Preemptible with notice is preemptible time which cannot be preempted without prior notice given by a specific time, for example, one week before airing. Often, at the time notice is provided, the advertiser is accorded the option of paying more for the spot in order to avoid preemption.

[104] Run-of-schedule refers to preemptible time that can be scheduled at any time during the broadcast day at the discretion of the station.

[105] *See 1988 Public Notice*, 4 FCC Rcd 3823, 3824 (1988).

[106] *Id.*

[107] *Id.*

[108] *See, e.g.*, comments of Shamrock at 14; Koteen and Naftalin at 1519; AFB at 21; reply comments of Gray at 4. Several commenters, such as Covington and Burling, extensively cite the legislative history of FECA and Section 315(b) to show that early provisions requiring that candidates be sold fixed time at run of schedule or preemptible rates were specifically rejected by Congress. Covington and Burling comments at 2-3.

[109] *See* comments of AFB at 5, NAB at 3, Gray Reply at 3, NCAB Reply at 2.

[110] Greater Media comments at 7.

[111] *See, e.g.*, Comments of Paducah at 4; INTV at 7; Cox at 19; Dow, Lohnes and Albertson at 15; ABC at 7. NCAB notes that Section 315(b) was intended to be interpreted so as to "make use of each broadcaster's own commercial practices rather than impose on him an arbitrary discount rate applicable to all stations without regard to their differences," citing the Senate Report on the 1972 amendments establishing the LUC requirements. NCAB Reply at 13.

[112] *See, e.g.*, comments of Paducah at 2.

[113] *See, e.g.*, comments of INTV at 7, 13 and 15.

[114] *See, e.g.*, Paducah at 7; Shamrock at 12-13; Busse Broadcasting at 6; AFB at 27. AFB also argues that the high cost of auditing sales rates *after* the ads run, which is necessary to enable the station to provide any requisite rebates throughout such an "extensive" class of time, imposes significant extra costs upon *all* advertisers. *Id.* at 30.

[115] NBC comments at 29.

[116] Comments of Fox at 6.

[117] Fox Reply at 7.

68. In contrast, Kahn and Jablonski argue that changing sales practices make the calculation of LUC easier, not more complex. They contend that advertising rates are "so competitive that heavy advertisers are able to negotiate cheap rates without any distinction based on class." They thus conclude that there is only one class of time -- negotiated -- and further claim that Section 315(b) requires that the lowest rate of the station for each daypart should be provided to candidates. [118] These commenters also cite the court's statement in *Hernstadt v. FCC* [119] that "if broadcasters have total discretion to define 'class of time'... they will be free to return to pre-1952 rate discrimination simply by defining a 'political' class of time, with higher rates than other classes, and offering candidates only 'political' time." [120] They thus argue against broad discretion, claiming that it will only lead to abuse.

69. ABC asks the Commission to clarify that run of schedule is a separate class of preemptible time that gives broadcasters maximum scheduling discretion because the station merely has to place the ads so that the advertiser's overall rating point objective is met. [121] Koteen and Naftalin contend that "class of time" should be defined to refer primarily to distinctions affecting the likelihood that a particular spot will run at a particular time. [122] Kahn and Jablonski respond that a spot's chances of preemption are not governed by price alone, and argue that whether a spot is preempted or not depends upon how "favored" the advertiser is. [123]

70. *Decision.* We are persuaded by the arguments of the overwhelming majority of commenters that our current policy of treating all immediately preemptible time as an all-inclusive single class does not appear to effectuate what Congress envisioned when it enacted Section 315(b). We accordingly conclude that our policy should be changed to reflect more accurately the realities of the advertising marketplace. As we stated in the *NPRM*, it is our understanding that, over the years, the industry has moved away from a system based primarily on the sale of volume discounts to a system that uses a "grid card" to give stations greater flexibility when selling inventory. The latest development appears to be the introduction of a "yield maximization" system, under which spots are in essence auctioned to the highest bidder and the price of a given class of time changes constantly to respond to fluctuating supply and demand. [124]

71. Under certain current sales practices, a commercial advertiser may choose to take a significant *prospective* risk of nonclearance -- and pay less accordingly -- that a political advertiser would not accept. Under our current method of interpreting *all* immediately preemptible time as a single class, however, a candidate could select a "higher" priced level of immediately preemptible time to ensure that his ad runs, ostensibly paying that higher price for associated increased preemption protection, knowing that he will nevertheless be rebated to the lowest priced preemptible level that ultimately clears -- without having assumed the additional risk of nonclearance that other advertisers have accepted when they purchased time at the lower price. Thus, the "higher" payment is a fiction, and the candidate is essentially afforded "fixed" status at a preemptible rate, a result specifically rejected by Congress. [125]

72. Nonetheless, as the court noted in *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980), broadcasters do not have *total* discretion under Section 315(b) to define classes of time in any manner. [126] We thus believe the better interpretation of the law is that, while stations may not use class distinctions to defeat the statutory purpose of the LUC requirement, they may establish and define their own reasonable classes of immediately preemptible time. The differences between classes, however, may not be based solely upon price or the identity of the advertiser; rather, some other demonstrable benefit, such as varying levels or assurances of preemption protection, scheduling flexibility, or special make-good benefits, must be used to distinguish between different classes of immediately preemptible time. Furthermore, as discussed above, we hereby hold that all classes of time must be disclosed to candidates and made available in compliance with the lowest unit charge requirements. [127] To further safeguard against possible abuse in the creation of various classes, candidates will be able to file complaints with the Commission to challenge classes viewed as manipulative or discriminatory.

73. These same principles apply to establishing permissible classes of "preemptible with notice" time. Under our new policy, licensees will be allowed to establish reasonable classes of time (such as preemptible with one day's, two days', one week's or two weeks' notice) so long as they clearly define all such classes, disclose them to candidates, and offer *all* such classes of preemptible with notice time to candidates in compliance with the lowest unit charge requirements. [128]

74. *Non-preemptible.* The *NPRM* also sought comment on whether nonpreemptible and fixed (or "fixed position") should be considered distinct: (classes for LUC purposes and, if so, how each type should be defined. [129] Few candidates address whether "fixed position" and "non-preemptible" should be treated as separate classes of time. Gillett supports this approach, proposing that "fixed position" should refer to spots designated to air at specific times on specific days, and "non-preemptible" should re-

---

118 Kahn and Jablonski at 15.
119 677 F.2d 893 (D.C. Cir. 1980).
120 *Id.* at 900, cited in Kahn and Jablonski Reply at 9.
121 Comments of ABC at 8.
122 Koteen and Naftalin comments at 32.
123 Kahn and Jablonski Reply at 10.
124 *NPRM* at para. 19.
125 *See* 117 Cong. Rec. 29, 026-29 (1971).
126 *See Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980).
127 Of course, stations will be required to provide timely rebates to candidates in the event that a commercial advertiser's spot clears at a lower rate within the same class of time, as established and disclosed by the station.
128 We note that nothing herein changes our current policy that runof-schedule time is a separate class of time that gives broadcasters maximum scheduling discretion in that the broadcaster is merely required to place the ads purchased so that the advertisers' overall rating point objective is met. We note, however, that as in the case of any other class of time offered by a licensee to commercial advertisers, information regarding run-of-schedule time must be disclosed and the class must be made available to candidates.
129 *NPRM*, 6 FCC Rcd at n. 63.

fer to spots designated to air in a particular time period or on particular days that cannot be preempted for any reason by any other spot except for a fixed position spot.[130] Fox contends that "non-preemptible" means that the spot may not be deleted by the broadcaster *once scheduled*, but that the station has flexibility in placing the spot within the same time period or daypart specified by the advertiser.[131]

75. *Decision.* Consistent with our decision to give licensees greater discretion in establishing different classes of immediately preemptible and preemptible with notice time, we conclude that stations may treat nonpreemptible and fixed position as distinct classes of time, provided that they articulate clearly the differences between such classes, fully disclose them to candidates, and make them available to political candidates in compliance with the lowest unit charge requirements.

76. *Candidate-Only Class of Time.* In our *1988 Public Notice*, we recognized that "non-preemptible 'fixed rate' spots are frequently offered to political candidates only."[132] We noted that rates for non-preemptible time are typically higher than preemptible rates because they carry a guarantee of airing at a particular time, and further recognized that because of this guarantee, candidates "often choose to pay the higher non-preemptible rate."[133] In its *"Questions and Answers"* released following the 1990 political programming audit, the Mass Media Bureau informed licensees that broadcasters "can charge candidates a premium for a non-preemptible class of time, only if such a higher priced class of time is also made available to commercial advertisers." [134] It stated further that a station cannot create a special class of non-preemptible time that it knows only candidates will purchase while at the same time offering a less expensive "preemptible" class to commercial advertisers that in reality offers virtually the same benefits as the higher priced class of time.[135]

77. *Issue and Comments.* The *NPRM* sought comment on our existing policies concerning the creation of candidate-only classes of time. In response, many parties argued that stations should be able to sell a special class of fixed or non-preemptible time to candidates, regardless of whether any commercial advertisers choose to purchase such time. [136] Most complained that such a practice was clearly condoned by the *1988 Public Notice* , and that the 1990 *Questions and Answers*' prohibition of such a practice was a radical departure from precedent that should be reversed. [137] These commenters also contend that broadcasters should be able to create a special class of time to deal with the candidates' special needs and that any concern about higher rates can be dealt with through adequate disclosure requirements. [138] Such a rate is justified, they say, because "candidates' demand for certainty in the scheduling and broadcast of their political advertising messages is relatively inelastic." [139]

78. Kahn and Jablonski argue, however, that if a broadcaster has not actually sold fixed time to commercial advertisers, there is no objective method for determining a fixed LUC. [140] They contend that "approving a fixed political rate would be tantamount to granting the industry a license to overcharge." [141]

79. CBS suggests that, if the Commission prohibits sales of non-preemptible time to candidates unless the licensee has also made *bona fide* efforts to sell such time to commercial advertisers, an offer of non-preemptible time to commercial advertisers should be presumed to be *bona fide* so long as it is included on the commercial rate card, even if no commercial advertiser buys it. [142] Kahn and Jablonski acknowledge that "if a record of good faith efforts to comply existed, this concept [creation of a special class of fixed time at a discount rate for candidates] might merit consideration." [143]

80. *Decision.* The Commission will continue to prohibit the creation of a special, premium-priced class of time that is sold only to candidates. While we recognize that candidates often seek to purchase fixed or nonpreemptible spots because they are more suited to candidates' needs, we are concerned that allowing stations to create a special class of time sold *only* to candidates would lead to abuse. We will, however, permit stations to sell to candidates premium-priced fixed or non-preemptible time if (1) such a higher priced class of time is made available on a *bona fide* basis to *both* candidates and commercial advertisers, and (2) no lower-priced class of time (*i.e.*, a preemptible class) sold to commercial advertisers is functionally equivalent to the non-preemptible class.

81. The Commission will view a preemptible class as functionally the same as a non-preemptible class if, due to the station's own priorities against preemption or other discount privileges, a commercial advertiser is, in practice, assured of not being preempted while paying a lower preemptible rate. The Commission will not require that commercial advertisers actually *purchase* a non-preemptible or fixed class; rather, to be considered *bona fide*, the class must be offered to commercial advertisers and must legitimately be available to them. [144]

---

[130] Gillett comments at 13.

[131] Fox Reply at 5.

[132] *1988 Public Notice*, 4 FCC Rcd 3823, 3824 (1988).

[133] *Id.*

[134] *Questions and Answers Relating to Political Programming Law*, 68 RR 2d 113 (1990).

[135] *Id.*

[136] *See generally*, comments of CBS at 7; Shamrock at 5; NBC at 32; Cox at 21. MPC agrees that the law permits broadcasters to structure both preemptible and non-preemptible classes of time for candidates. MPC comments at 4.

[137] Comments of CBS at 7-8; Shamrock at 5; Cox at 21; Paducah Newspapers at 5.

[138] *See, e.g.*, comments of NBC at 32. NBC further notes that the 1990 *Questions and Answers* released by the Bureau appeared to create a *per se* prohibition against selling fixed time to candidates if a licensee has not sold fixed time to any commercial advertiser. By contrast, NBC claims, the *NPRM* appears to indicate that the Commission would replace such a *per se* prohibition with a case-by-case analysis to determine whether a station has sold what is actually "fixed" time to a commercial advertiser under a "preemptible" label, finding a violation if the same opportunity was not made available to candidates. NBC comments at 36. NBC states that such a refinement of the prior policy that permitted the sale of fixed time to candidates only is appropriate and would be consistent with the requirements of Section 315(b).*Id.* at 38.

[139] NCAB Reply at 15.

[140] Kahn and Jablonski comments at 10.

[141] *Id.* at 11.

[142] CBS comments at 10.

[143] Kahn and Jablonski comments at 5.

[144] Nothing in this decision precludes a station from offering a nonpreemptible, candidate-only class of time at a discount to

D. Weekly Rotations.

82. *Issue and Comments.* In the *NPRM,* we noted that stations increasingly sell preemptible time to advertisers in weekly rotations. [145] Under this system, an advertiser purchases one or more preemptible spots to run over the course of the week during pre-determined dayparts. The specific time and day that each spot airs is determined by the station; the only constraint is that each of the advertiser's spots must run during the chosen dayparts. As stated in the *NPRM,* the lowest unit charge for preemptible time sold by stations using weekly rotations is the lowest price that any advertiser paid in a particular rotation during a particular week.

83. Most commenters agree that LUC rates should be permitted to fluctuate week to week if time is sold in weekly rotations, with some commenters stating that the LUC may vary even more often. [146] For example, Fox observes that, for prime time, rates may vary on a daily or even per-program basis. [147] Thus, the LUC for each class of service could be determined on a daily, program-by-program basis. [148] Similarly, CBS observes that the LUC may vary program to program in the same time spot in a given week, week to week within a given program, and week to week for weekly rotations. [149]

84. ABC asks the Commission to clarify that different time blocks offered in weekly rotation plans are different "periods" for LUC purposes, whether or not they overlap. For example, a 9:00 a.m. to 4:00 p.m. rotation is not the same as 3:00 p.m. to 4:00 p.m. ABC at 14. Similarly, CBS contends that "Geraldo," Monday - Friday is one class, while Monday, 8:00 p.m. to 10:30 p.m. (during which Geraldo may be aired) is a separate class. [150] Fox agrees, stating that Tuesday, 12:00 p.m. to 5:00 p.m., Tuesday, 4:00 p.m. to 5:00 p.m. and Monday - Friday, 4:00 p.m. to 5:00 p.m. are all separate rotations and should be treated as separate classes because they offer the station different degrees of scheduling flexibility.[151]

85. *Decision.* The Commission will continue its policy of permitting stations to calculate the lowest unit charge on a weekly basis in connection with the sale of weekly rotations. This policy recognizes the fact that many stations sell preemptible time on a weekly basis and that the lowest price paid by any advertiser may vary from week to week. Stations, however, must verify that the lowest unit charge is the lowest price paid by any advertiser during a given period in the relevant week, including those commercial advertisers or other political candidates whose spots appeared in the relevant week but who may have contracts that are in effect over the course of several weekly rotations.

86. In addition, the Commission will continue to recognize that distinctly different rotations constitute separate periods of time for purposes of calculating lowest unit charge, regardless of whether or not they overlap. *Distinctly* different rotations are rotations that have meaningful differences in value to an advertiser. For example, a radio drive-time rotation of 6:00 a.m. to 9:00 a.m. is a distinctly different rotation from a 6:00 a.m. to 3:00 p.m. rotation because of the high possibility that the advertiser's spot will run in the less valuable 10:00 a.m. to 3:00 p.m. time period. If, however, the second and less expensive rotation is 6:00 a.m. to 10:00 a.m., the rotations would not be considered *distinctly* different because of the small likelihood that the spot will air outside of the prime time drive period of 6:00 a. m. to 9:00 a. m.

87. In a similar vein, we will also continue our policy of recognizing that prime-time programs can differ in value on a program-by-program basis. Where such differences are reflected in a station's sales practices, we will allow the station to treat each prime-time program as a separate rotation or time period for purposes of calculating the lowest unit charge.

E. Increase in Rates During Election Period.

88. *Issue and Comments.* Current Commission policy provides that stations may not increase rates for candidate advertising during the election period except for ordinary business practices, such as rate changes when new audience ratings are published, or seasonal changes, such as the start of a new schedule. As discussed in the preceding section, Commission policy also recognizes that, in some circumstances, rates for spots may vary from week to week, or even program to program.

89. The majority of commenters support retention of these Commission policies. MPC, however, asserts that major advertisers such as McDonald's, Proctor & Gamble, Pepsi, and Bristol Meyers do not pay different rates for the same daypart or programs in different weeks; they get the same low rate because they are buying in volume. [152] Thus, MPC claims, candidate rates should not vary weekly. Kahn and Jablonski state that if licensees lock in rates for their most-favored commercial advertiser that do not vary weekly, then they should not be permitted to raise rates over the course of the election period for candidates.[153] These commenters add that licensees also should be required to allow candidates to place advance orders where the station's most-favored advertiser is entitled to do the same. [154]

90. *Decision.* The Commission will continue its policy of not permitting rate increases during election periods except in circumstances governed by "ordinary business practices," which we have defined in the past to include changes in audience ratings, seasonal program changes, and, for stations that sell time on weekly rotations, rate changes on a weekly basis. We also will continue to follow our current policy that candidates who contract to

---

political advertisers. Nothing in the statute or its legislative history prohibits such a sales practice which would, in effect, confer a greater benefit upon candidates than that afforded to the station's most-favored advertiser.

[145] Weekly rotations connote time which can run anytime Monday through Friday during a particular program, daypart or time period at the station's discretion (*e.g.,* spot will run during Jeopardy, 7:00 to 7:30, at some point Monday to Friday).

[146] *See e.g.,* Shamrock comments at 18; AFB at 37; NAB at 17.

[147] Fox comments at 7-8.

[148] Fox Reply at 13.

[149] CBS comments at 12.

[150] *Id.* at 11.

[151] Fox comments at 7.

[152] MPC comments at 4.

[153] Kahn and Jablonski comments at 13.

[154] *Id.* at 14.

purchase time after the effective date of such a rate increase are entitled to the lower rates charged to other advertisers (commercial or political) who contracted for time before the rate increase so long as the spots are of the same class and amount of time. If, for example, a station has a long-term contract with a commercial advertiser that is less than the lowest rate sold on a weekly basis for a particular week, the long-term contract rate is the lowest unit charge for those weeks in which spots are aired for the same class and amount of time. In addition, as the commenters note, stations may have different rates for various days and programs during prime time [155], or, indeed, for any program based on audience ratings. As discussed above, if different programs have different rates, the lowest unit charge can change program-by-program.

F. Calculation of Rebates

91. *Issue and Comments.* The *NPRM* recognized that candidates may be entitled to rebates where they pay more than the lowest unit charge for a given class of time.[156] When addressing the issue of refunds, some commenters state that licensees should be required to review their program logs weekly to determine whether rebates are required, giving such rebates or credits promptly.[157] National Media emphasizes that the timeliness of rebates is critical to candidates, and suggests that the FCC should set guidelines on when rebates must be calculated. In particular, it recommends that notifications should be sent to candidates every Tuesday or Wednesday following air dates. [158]

92. *Decision.* The Commission recognizes that timely rebates are crucial to candidates, who need to use all available funds to continue their campaigns. We accordingly will henceforth require that stations review their program logs periodically during the election period to determine whether rebates are required, and issue any such rebates or credits promptly. Although we will not mandate a weekly review or designate specific days for the licensee to review its logs, we expect that licensees will conduct periodic audits on a timely basis, making every effort to afford necessary rebates or credits before the election when possible. Thus, recognizing candidates' need to maximize their immediate campaign funds, stations will be expected to provide rebates on a more expeditious basis as the election day approaches.

G. Package Plans.

93. *Issue and Comments.* Many of the commenters express confusion about treatment of package plans [159] and ask the Commission to clarify its policy that individually negotiated packages must be included in a station's calculation of lowest unit charge. Commenters interpret the *1990 Audit Report* as now concluding that all individually negotiated package plans are simply volume discounts that must be factored into the LUC for each segment of the package, whereas "special discount rates" or "special package plans" offered to all commercial advertisers constitute a separate class of time. [160] Many commenters argue that candidates should not be permitted to cherry-pick the most favorable rates from package plans without buying the entire package. For example, Fox contends that, while all package plans should be offered to candidates, each should be treated as a separate class of time, even if tailored for particular advertisers. It also asks the Commission to clarify that candidates must buy comparable combinations of dayparts to obtain package plan rates. [161] AFB argues that treating package plans as mere volume discounts is particularly unfair when applied to the value of spots in sports packages, because some games are more valuable than others." [162] It claims that sports packages should be special package plans constituting a separate class of time, not mere volume discounts; at a minimum, the licensee should have discretion to assign a separate value to each game for LUC purposes so long as the total value for all games does not exceed the price of the package.

94. Cox raises some package plan issues peculiar to cable systems. Cable package plans often involve spots on different cable channels that have different values. Cox asks the Commission to define cable "package plans" as established combinations of spots, announcements, channels and program sponsorships that constitute a separate class of time, and to state that a candidate must purchase a proportionate number of spots on all channels to qualify for the LUC package rate – candidates should not be permitted to dissect a package and establish a LUC for each channel separately.[163]

95. *Decision.* Based on a reevaluation of the statutory lowest unit charge requirements, we will discontinue our policy of permitting stations to treat "packages" as a separate class of time. [164] We will now require stations to include in their LUC calculations all rates offered to commercial advertisers in packages. This policy will apply to all packages, whether individually negotiated or generally available to every advertiser. Thus, stations must include rates found in any packages when computing or disclosing to candidates the lowest unit charge for any request for a class and length of time in the same time period.

96. The statutory language of Section 315(b) expressly entitles candidates to the lowest *unit* charge for the same class and amount of time for the same period. It is well established that, through this language, Congress intended for candidates to receive the benefits of rates without having to purchase in bulk or over extended periods of time. [165] Since packages are, in effect, volume discounts, we conclude that candidates will no longer have to buy an

---

155 *See 1988 Public Notice*, 4 FCC Rcd at 3824.

156 While this *Report and Order* provides stations with more discretion with respect to defining different classes of immediately preemptible and preemptible-with-notice time (*see* paras. 68-71, *supra.)*, we note that stations are still required to provide rebates to candidates where they pay more than the lowest unit charge for a given class of time.

157 *See e.g.*, Shamrock comments at 18, AFB at 37, NAB at 17.

158 National Media comments at 8.

159 As used herein, package plans are established combinations of spots offered at a given price, which are generally available to all advertisers.

160 Koteen and Naftalin comments at 21.

161 Fox comments at 9.

162 AFB comments at 31.

163 Cox comments at 23.

164 *Political Primer*, 68 FCC 2d 2209, 2276-77 (1978); *Political Primer*, 100 FCC 2d 1476, 1515 (1984).

165 *See* Sen. Rep. No. 96, 92d Cong., 1st Sess. (1971).

entire package or a proportionate package in order to derive the benefits of rates found in packages. In addition, today's sales practices regularly involve the sale of commercial time in individually negotiated packages. Because most-favored advertisers are usually those advertisers who individually negotiate packages on a monthly, quarterly, and sometimes yearly basis, it would frustrate the intent of the statute to exclude rates offered in those packages from LUC calculations.

97. The Commission, however, will continue to rely on the reasonable good faith judgment of the station as to the value of a particular spot in a package. For example, if a station has a sports package which includes several games at a single package price, then the per-game rate for lowest unit charge purposes is the total package price divided by the number of games. If, however, each game in a package is priced separately in the contracts with commercial advertisers, then the specified contract price will be the value of a spot in that game. A package rate may or may not be the lowest unit charge for a specified time period, depending on the price of other spots sold in the time period. A candidate is entitled to the lowest rate sold during the time period. [166]

98. We believe that this policy will simplify the calculation of lowest unit charge and will also simplify the disclosure process. Individual package terms will not have to be disclosed to candidates as long as the *rates* contained in those packages have been included in the station's calculation of the lowest unit charge for each program or daypart.

H. Merchandising Incentives and Bonus Spots.

99. *Issue and Comments.* Numerous commenters contend that, while noncash promotional incentives [167] such as bumper stickers, mailings, displays, tickets, or trips won for achieving certain volume levels should be offered to candidates and commercial advertisers on the same terms and conditions, they should not be factored into LUC calculations because they are either too difficult to value or only add a *de minimis* value. [168] National Media agrees that the use of billboards [169] and merchandising incentives such as trips and tickets should be excluded from LUC calculations, but contends that bonus spots of 30 seconds or longer should be factored into the LUC calculation. [170]

100. Kahn and Jablonski contend that there is no authority to exclude contingent bonuses [171] from LUC calculations, and argue that if the Commission allows stations to disregard contingent bonuses that vest after the election, then "stations would simply time such contingencies to occur after the election" so they could avoid lower LUCs. [172] Kahn and Jablonski also argue that all free spots or bonus spots of any kind should be factored into LUC calculations because stations use bonus spots to avoid the required candidate discounts. [173]

101. *Decision.* The Commission agrees with the commenters' assertion that noncash promotional incentives should not be included in calculations of lowest unit charge. Inclusion of such items is confusing, burdensome to broadcasters and appears not to offer candidates significant benefits on a per-spot basis. Moreover, inclusion of these items is not required in order to place candidates on a par with the most-favored advertisers. Rather, stations need merely to offer all noncash merchandise to political advertiser on the same basis as commercial advertisers. Therefore, the Commission will not require such promotional materials as mugs, bumper stickers, and trips to be included in the calculation of lowest unit charge.

102. Bonus spots will, however, be factored into LUC calculations, as the value of such spots is readily ascertainable. We believe, for example, that a reasonable way of calculating the value of bonus spots for purposes of determining the LUC would be to compute an "average cost," reached by dividing the total cost of the spots by the number of spots, including bonus spots, sold.

I. Fire Sale.

103. *Issue and Comments.* The *NPRM* asked for comment on the Commission's "fire sale" policy, which provides that a discount on time afforded to a last-minute buyer establishes the lowest unit charge for its particular class of time throughout the election period. NAB contends that the fire sale policy should be abolished because it is unreasonable to force stations to apply a price given to liquidate perishable inventory to an entire campaign period. [174] CBS argues that a last minute discount should not establish the LUC for an entire election period, but that a fire sale should establish the LUC only for the week, program or daypart (whatever the LUC fluctuation period is) in which the fire sale advertisement airs. [175] Pulitzer contends that candidates should be offered fire sale inventory on the same terms as commercial advertisers, but that they should only apply to a specific time period, such as a weekend or special sporting event, for LUC purposes. [176]

104. Group W states that the fire sale policy should be retained because it is a "bright line test that is simple to use." [177] Kahn and Jablonski argue that "abolition of this

---

[166] We also reiterate that make goods, preemption priorities, and other factors that add value to spots, may be associated with packages and will affect the lowest unit charge calculation. *See* para. 61, *supra.*

[167] Also known as advertiser incentive arrangements, these are products or other rewards given to advertisers who spend a certain minimum amount on advertising. They are often utilized to encourage advertisers to purchase time from a station.

[168] *See generally,* comments of Koteen and Naftalin at 47-48; INTV at 14-15. Kahn and Jablonski respond that excluding noncash incentives from LUC calculations would ensure their widespread use in the future so as to "subvert" the Communications Act. Kahn and Jablonski Reply at 11.

[169] Billboards are groups of short promotional announcements (10 seconds or less) listing the sponsors of advertising for a particular daypart or program.

[170] National Media comments at 7.

[171] Contingent bonuses are bonus spots provided when a promised audience is underdelivered, for example, where only 4000 households of a promised 7500 are reached by the purchased schedule, requiring additional "contingent bonuses" to meet the promised goal.

[172] Kahn and Jablonski Reply at 14.

[173] *Id.* at 15.

[174] NAB comments at 17.

[175] CBS comments at 12.

[176] Pulitzer comments at 10-11.

[177] Group W comments at 14.

doctrine would mean that stations would consider all spots sold below their artificially inflated political rate as 'fire sale' spots." [178]

105. *Decision.* The Commission will modify its interpretation of its "fire sale" policy. There has been considerable confusion with respect to how the sale of available inventory at the last minute affected the LUC. When the fire sale policy was first adopted in 1972, many, if not most, spots were sold on a non preemptible basis. As sales practices have evolved, however, the last-minute sale of available inventory has included preemptible time, which may be offered at different rates in relationship to supply and demand. Thus, applying the original fire sale policy results in a last-minute sale of preemptible time, changing the LUC for the entire statutory period even though higher rates in the weeks preceding the fire sale may have been fully justified by demand.

106. To correct this inequity, the Commission will now treat the sale of all available inventory at the last minute as affecting all classes of time, but *only* during the particular time period (daypart or program) in which the "fire sale" spots are broadcast. When a station faces the extraordinary situation of conducting a fire sale to dispose of excess inventory, it is not accurate to treat such sales as affecting only one class of time. The effect of a fire sale is to eliminate class distinctions. All sales on a "fire sale" basis are, in essence, sales of non-preemptible time. In such instances, in order to comply with the intent of Section 315(b), we believe that the fire sale rate should be considered the LUC for *all* classes of time sold, but only during the time period in which the fire sale actually occurs, *i.e.*, a daypart, program, day, etc. [179]

107. This approach is fully consistent with our policy that rates may change on a weekly basis in response to demand and our similar policy that rates for preemptible time, which may also fluctuate in response to demand, may be treated as separate classes of time. The fire sale rate must, of course, be made available to candidates. The availability of 'fire sale' spots also must be fully disclosed to candidates. Moreover, in response to the concerns of some of the commenters, we see little danger that abuses will occur if we adopt this policy. To the extent candidates have purchased time during the same time period in which the fire sale occurs, they will -- to their benefit -- be equally entitled to the fire sale rate. Further, if examination of a licensee's records revealed a pattern indicating that fire sale rates were afforded repeatedly only to particular advertisers, we would be alerted to the possibility of abuse.

J. Timely Make Goods.

108. *Issue and Comments.* The *NPRM* asked for comment on the Commission's policy that a station must offer candidates make goods on a timely basis if it would so treat its most-favored advertiser. The Mass Media Bureau has also stated that timely make goods must be offered to candidates if they were ever offered to even one commercial advertiser. Numerous commenters contend, however, that it is unreasonable to require broadcasters to guarantee that preempted candidate spots will be made good prior to the election if the station has *ever* guaranteed a make good on a time-sensitive basis to a commercial advertiser. [180] These commenters argue that such a requirement effectively confers non-preemptible status upon all spots purchased by candidates without regard to the normal preemptibility of the spot, thus giving them better treatment than even the station's most-favored commercial advertiser. [181] Rather than mandating an absolute guarantee, they claim, the Commission should require broadcasters to employ a "best efforts" policy, based upon available inventory, to air the make good prior to the election. [182]

109. Cox and NAB contend that stations should be able to place limitations on pre-election make goods and should only be required to air any such make goods if they have provided similar time-sensitive make goods to commercial advertisers within a specified period of time preceding the relevant campaign period. [183] Outlet suggests that stations be permitted to provide make goods on a run of schedule basis, with the candidate given the opportunity to accept or reject the proffered make good.[184]

110. National Media argues that stations should be required to make good political spots within the planned air dates or the following week. [185] In response to the commenter's "best efforts" suggestion, Kahn and Jablonski argue that such a make good policy would have the same effect as no make good policy, and is "contrary to the Act." [186]

111. *Decision.* We continue to believe that licensees who offer timely make goods to commercial advertisers must also offer timely make goods to political candidates before election day. This policy comports with Congress' intent to place candidates on par with a station's most-favored commercial advertiser. Time-sensitive make goods are a discount privilege and assure timely rescheduling of preempted spots during comparable, or even superior, time periods. As we have previously noted, make goods form an integral part of the industry practice of selling preemptible time. In essence, they permit the broadcaster to maintain revenue from a preempted spot and at the same time enable the advertiser to retain the "reach" of the missed spot.

---

[178] Kahn and Jablonski Reply at 11.

[179] For example, if a station finds that it has excess inventory during a particular program or daypart and offers to sell those spots to any commercial advertiser for a significant discount -- a "fire sale" -- it is clear that any commercial advertiser purchasing those spots will receive essentially non-preemptible time regardless of what would normally run in that program of daypart. Thus, any candidate who purchased time during that same program or daypart must receive the fire sale rate regardless of the class of time the candidate originally purchased.

[180] Comments of Koteen and Naftalin at 29; Covington and Burling at 6; AFB at 33; NCAB Reply at 18.

[181] Comments of NBC at 44; Covington and Burling at 6; NCAB Reply at 18.

[182] Comments of NBC at 4; Koteen and Naftalin at 29; NCAB Reply at 18.

[183] Cox suggests sixty days before the statutory period (Cox comments at 16); NAB suggests six months before the LUC period (NAB comments at 17).

[184] Outlet comments at 4.

[185] National Media comments at 6.

[186] Kahn and Jablonski Reply at 11.

112. Accordingly, we will continue to require stations to offer make goods to candidates if make goods are also offered to the stations' commercial advertisers who purchased time in the same class. We agree, however, that the Act does not mandate that this obligation remain completely open-ended. In this regard, we believe that candidates should be entitled to timely make goods only if the broadcaster has provided a make good to any commercial advertiser during the year preceding the 60- or 45-day statutory LUC period. We believe that such a one-year period will be sufficient to establish the licensee's current make good practices with regard to its most-favored advertisers. We also affirm our prior ruling that make goods for political spots must air before the election "where the licensee would so treat its most-favored commercial advertiser where time is of the essence." [187]

K. Calculation of Make Good in LUC.

113. *Issue and Comments.* The *NPRM* also reiterates the Commission's policy that prices paid for make goods must be included in the station's calculation of lowest unit charge. [188] Many commenters assert that make-good options should be provided to candidates on the same terms as to commercial advertisers, but that make-good spots should not be included in calculating the LUC. [189] According to the commenters, make goods can be used (1) to "make up" to a commercial advertiser for any inconvenience in preemption, [190] (2) to make up for any failure to meet audience reach or ratings requirements, [191] or (3) to correct for preemptions outside the station's control, such as network changes, technical problems, show cancellations or sports overruns. [192] The commenters argue that make goods given for such reasons do not confer additional benefits or discounts, and thus should not be included in LUC calculations. [193] Moreover, the commenters assert that an advertiser generally values a make good spot less than the original spot purchased, while another advertiser might place a higher value on the same time, so it is not fair or accurate to factor any charge for the make good into the LUC. [194]

114. *Decision.* As discussed above, we recognize that make goods are an integral aspect of the sale of preemptible time and that they may, in some circumstances, bestow an additional benefit or discount on the advertiser whose preemptible spot is made good. In order to ensure that political buyers also are able to enjoy these advantages, we will continue our policy of requiring stations to include make goods in LUC calculations. This means that, when computing the LUC for a given class of time, a broadcaster must include the rate paid by an advertiser whose spot was "made good" during the relevant period.

115. Where the value of the make-good spot is equal to that of the original spot, our policy obviously will have no practical effect on the LUC, since the rate for either spot will be the same. We recognize, however, that stations sometimes choose to "appease" an advertiser whose spot has been preempted by running a make-good spot in a more valuable time period. In this situation, the advertiser receives an additional benefit or discount that should also accrue to candidates who have purchased the same class of time in the same period. Accordingly, we will require that, where a station places a make good in a more valuable program or daypart, the value of that make good must be factored into the calculation of the LUC for that more valuable program or daypart. Candidates purchasing the same class of time who have paid a higher rate for the program or daypart will be entitled to a rebate of the difference between the rate they paid and the rate of the made good spot.

116. In addition, the Commission will continue to permit exclusion from make-good calculations any make goods or bonus spots furnished to meet contracted-for promises of certain audience numbers, demographics, or ratings, when that is the station's practice for selling time to both commercial and political advertisers. Further, just as for commercial advertisers, if a candidate's promised audience delivery fails to be realized, the candidate is entitled to additional make-good or bonus spots in the same manner as commercial advertisers.

L. Sold-Out Time.

117. *Issue and Comments.* The *NPRM* sought comment on whether preemptible time could ever be sold out since a buyer can offer to pay a higher rate and preempt an incumbent. ABC states that the Bureau's statement in the 1990 *Questions and Answers* that "unless the entire inventory is sold out on a non-preemptible basis, a licensee must sell to candidates at the commercial selling level for preemptible time" effectively creates mandatory access at odds with Section 315.[195] Other commenters note that price alone is not the driving force behind the availability of time because the disruption to program logs or potential advertiser dissatisfaction from preemption could outweigh the benefits from a slightly or even significantly increased rate. [196] Conversely, National Media asserts that preemptible time can never be sold out; MPC states that it is "highly unlikely" that preemptible time would ever be sold out, with the Olympics and the Super Bowl creating possible exceptions. [197]

118. *Decision.* We take this occasion to clarify our sold-out policy. This policy would not, as some commenters seem to believe, force stations to afford candidates access to a particular program. Such a concern confuses our sold-out policy as it refers to LUC with the concept of "reasonable access" for federal candidates. Our

---

[187] *1988 Public Notice*, 4 FCC Rcd at 3823.

[188] *Id.*

[189] *See, e.g.*, comments of AFB at 34; NBC at 44; Gillett at 18; INTV at 16; Cox at 25.

[190] Group W comments at 15.

[191] ABC comments at 15.

[192] Gillett comments 17.

[193] Cox further asks the Commission to confirm that, with respect to cable, make goods given for audience underdelivery on one cable channel should not impact the LUC on any substitute channel. We agree with this interpretation. For example, if an advertiser buys time on the Discovery Channel, fails to achieve the bargained-for audience reach and is then given a make good on TNT, that make good will not be presumed to have a separate value that must be included in the LUC calculations for TNT sales. Cox comments at 25.

[194] NBC comments at 44.

[195] Comments of ABC at 12.

[196] Dow Lohnes and Albertson comments at 31.

[197] Comments of National Media at 7; MPC at 5.

LUC sold-out policy states that stations may not tell candidates that the preemptible time is sold out in order to force them to purchase non-preemptible spots in the same program or time period. There is no requirement, however, that stations sell candidates spots in a particular program in the first place. We merely state that once a station decides to sell time within a given period, it cannot inflate the price of a spot sold to a candidate beyond the minimum necessary to clear by claiming that all "preemptible" time is sold out.

119. We believe that this policy should be maintained in order to assure that candidates are not improperly steered toward buying fixed time in a program on the basis that all the preemptible time in a particular show is sold out. Preemptible time is not only a class of time but also a discount privilege, and, as such, it cannot be both offered to commercial advertisers and denied to candidates. In addition, preemptible time, by its very nature, cannot be "sold out" because an offer of a higher price will almost always preempt a lower priced spot. In the event a station uses varying levels of preemption protection as a means of establishing different classes of immediately preemptible time, it may disclose to candidates that lower priced spots are unlikely to clear in light of previous sales. [198] However, we emphasize that stations may not use this disclosure process to persuade candidates to buy premium-priced fixed or nonpreemptible spots by claiming that a given level of preemptible time has been fully sold and, therefore, is unavailable.

V. POLITICAL FILE REQUIREMENTS.

120. *Issue and Comments.* In addition to those requirements spelled out in the Commission's rules, the Commission has developed policies aimed at assuring complete, accurate and readable political files. [199] Some commenters maintain that the Commission should leave the political file rules alone -- they are adequate and should not be made more burdensome. [200] Others request that the Commission establish a uniform political file format for licensees to follow. [201] Some commenters specify what documents should be included in the file. MPC suggests that all rates as disclosed to candidates should be placed in the political file. [202] CBS suggests that the file include a record of all requests for time, records of time purchased, the time/date/rate/class of each spot, a notation if the spot was not aired as originally purchased (preempted, rescheduled, made good), but that it should not be required to include a notice of the exact time each ad runs because that "would be too burdensome." [203]

121. Kahn and Jablonski state that the file should be self-explanatory and should provide descriptions of the various classes of time; spots ordered; rate applied; whether and when spot ran; if preempted, whether a make good was provided; the amount of refunds, if any; reconciliation of any rebates; rate cards and a written statement of the licensee's political policies. [204] Wilson requests that the Commission confirm that the requirement to place advertising orders in the public file "as soon as possible" means as long as it takes to make a copy and put it in the file without delay. [205]

122. PBS suggests that the Commission should accept the good faith exercise of licensee judgment in organizing and maintaining the public file, enforcing a "rule of reason." [206] PBS maintains that there should be no penalties for good faith attempts at compliance because there can be reasonable disputable violations of the file rules.

123. *Decision.* We believe that our current rule 73.1940(d) adequately addresses the political file requirements and that continuation of our existing policies will best serve the interests of both candidates and broadcasters. We will continue to require that stations maintain neat and accurate political files so that anyone viewing the contents of the file will be able to readily discern what the station has sold or otherwise provided to each and every candidate.

124. In addition, the rule requires stations to document the "disposition of requests." Therefore, we will continue the policy requiring a station to file information showing the schedule of the time provided or purchased, when spots actually aired, the rates charged and the classes of time purchased. This vital information is necessary to determine whether a station is affording equal opportunities and whether the candidate is getting favorable or unfavorable treatment in the placement of spots, especially in light of the wide rotations offered by most stations. We will also continue to interpret "as soon as possible" as meaning immediately, under normal circumstances.

---

[198] We note that stations selling preemptible time on a strict auction basis (*i.e.*, price is the *only* variable and thus only a single class of time is involved) could not steer candidates to purchase a premium-priced *class* of time (for example," non-preemptible' time) by informing them that all preemptible time was "sold out," because, by definition, such preemptible time cannot be sold out.

[199] Section 73.1940(d) of the Commission's rules requires broadcasting stations to:

> ... [K]eep and permit public inspection of a complete record (political file) of all *requests* for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the *disposition* made by the licensee of such requests, and the *charges made*, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this section shall be placed in the political file as soon as possible and shall be retained for a period of two years.

47 C.F.R. 73.1940(d) (emphasis added). *See also*, 47 C.F.R. Section 76.205(d) for cable provision.

[200] Gillett comments at 19.

[201] Koteen and Naftalin comments at 48. AFB also suggests that the Commission specify what information related to rebates should be maintained in the political file. AFB comments at 44.

[202] MPC comments at 5.

[203] CBS comments at 31.

[204] Kahn and Jablonski comments at 16.

[205] Wilson comments at 2.

[206] PBS comments at 14.

ORDERING CLAUSES

125. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 312(a)(7), 315, and 317 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 312(a)(7), 315, and 317, Parts 73 and 76 of the Commission's rules, 47 C.F.R. Parts 73 and 76, ARE AMENDED, as set forth below. Moreover, because the primary season for the 1992 presidential elections begins January 4, 1992, and because candidates and broadcasters need certainty in the administration of our political broadcasting rules, pursuant to 5 U.S.C. Section 553(d)(3), we find GOOD CAUSE to make these rules effective January 4, 1992.

126. IT IS FURTHER ORDERED that MM Docket No. 91-168 is terminated. Further information on this proceeding may be obtained by contacting Milton O. Gross, Robert L. Baker, or Marsha J. MacBride, Mass Media Bureau at (202) 632-7586, or Diane Hofbauer, Office of General Counsel, at (202) 632-7020.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
FORMAL COMMENTS

Alabama Broadcaster's Association (ABA)

American Broadcasting Company (ABC)

American Family Broadcast Group, Inc. (AFBG)

Association of Independent Television Stations, Inc. (INTV)

Busse Broadcasting Corp. (Busse)

California State University (San Diego State University) (CSU)

CBS Inc. (CBS)

Covington & Burling: Benedek Broadcasting Group; Lin

Broadcasting Corporation; Midwest Television, Inc.;

Post-Newsweek Stations, Inc.; Providence Journal Company;

The Spartan Radiocasting Company (Covington and Burling)

Cox Cable Communications, Inc. (Cox)

Dow, Lohnes & Albertson: A. H. Belo Corporation; Booth American Company; Brill Media Company, Inc.; Cosmos Broadcasting Corp.; Cox Enterprises, Inc.; Diversified Communications; Great Empire Broadcasting Corp.; Multimedia, Inc.; Stauffer Communications, Inc. (Dow, Lohnes and Albertson)

Federal Election Commission (FEC)

Fisher, Wayland, Cooper & Leader, State Broadcasters Association of: Arizona, Connecticut, Iowa, Maryland/District of Columbia/Delaware, Minnesota, Missouri, New Hampshire, New Jersey, Oklahoma, Tennessee, West Virginia, Wisconsin. (SBA) Gillett Communications, *et al.* (Gillett)

Greater Media, Inc. (Greater Media)

Hogan & Hartson: Fox Television; Albritton Communications Company; Federal Broadcasting Company (Hogan and Hartson) Joint Comments of Public Broadcasting Licensees (JCPBL) KIVI Channel 6 Television (KIVI) Koteen & Naftalin on Behalf of 8 Broadcasters: Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; McGraw-Hill Broadcasting Company, Inc.; The New York Times Company; Renaissance Communications Corporation; Castle Broadcasting;

WFRV-TV, Inc. (Koteen and Naftalin) Law firms: Barnes, Browning, Tanksley & Casurella; Long, Aldridge, & Norman; Savell & Williams; Venema, Towery, Thompson & Chambliss (Kahn & Jablonski) Media Placement Consultants, Inc. (MPC) National Association of Broadcasters (NAB)

National Media Inc. (National Media)

NBC, Inc. (NBC)

North Carolina Association of Broadcasters (NCAB)

Osborn Communications Corp. (Osborn)

Outlet Broadcasting, Inc. (Outlet)

Paducah Newspapers, Inc. (Paducah)

Public Broadcasting Service (PBS)

People for the American Way(Citizen's Petition)

People for the American Way/Media Access Project (PAW/MAP)

Pulitzer Broadcasting Company and WDSU Television, Inc. (Pulitzer)

Reed Smith Shaw & McClay on Behalf of: California Oregon Broadcasting, Gannett Co., Inc.; Gaylord Broadcasting Company; Lee Enterprises, (RSSM)

RTNDA/Society of Professional Journalists (RTNDA)

Shamrock Broadcasting, Inc. (Shamrock)

State of Connecticut

Telecommunications Research and Action Center & Washington Area Citizens

Coalition Interested in Viewers' Constitutional Rights (TRAC)

Washington State University (WSU)

Westinghouse Broadcasting Company, Inc. (Westinghouse)

Wilson Communication Services, Inc. (Wilson)

REPLY COMMENTS

Allbritton Communications Company (Allbritton)

American Family Broadcast Group, Inc. (AFB)

Association of Independent Television Stations, Inc. (INTV)

Channel 40 Licensee, Inc. (KTXL)

Gray Communications Systems (Gray)

Law Firms; Barnes, Browning, Tanksley & Casurella; Long, Aldridge, & Norman; Savell & Williams; Venema, Towery, Thompson & Chambliss (Kahn & Jablonski)

Media Placement Consultants Inc. (MPC)

Media Plus

National Association of Broadcasters (NAB)

North Carolina Association of Broadcasters (NCAB)

People for the American Way/Media Access Project (PAW/MAP)

Public Broadcasting Licensees (PBL)

Radio - Television News Directors Associations, Reporters Committee for Freedom of the Press and Society of Professional Journalists (RTNDA) Telecommunications Research and Action Center and Washington Area Citizens

Coalition Interested in Viewers' Constitutional Rights (TRAC)

Appendix B

Title 47 CFR, Parts 73 & 76 are amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. 154, 303.

2. Section 73.1940 is revised in its entirety to read as follows:

Section 73.1940 Legally Qualified Candidates for Public Office.

(a) A legally qualified candidate for public office is any person who:

(1) Has publicly announced his or her intention to run for nomination or office;

(2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and

(3) Has met the qualifications set forth in either paragraphs (b), (c) or (d) of this section.

(b) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:

(1) Has qualified for a place on the ballot, or

(2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

(c) A person seeking nomination to any public office, except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(d) A person seeking nomination for the office of President of Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a) of this section:

(1) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia, or

(2) He or she has made a substantial showing of a bona fide candidacy for such nomination in that State, territory or the District of Columbia; Except, that any such person meeting the requirements set forth in paragraphs (a)(1) and (2) of this section in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this act.

(e) The term "substantial showing" of a bona fide candidacy as used in paragraphs (b), (c) and (d) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

3. Section 73.1941 is added to read as follows:

Section 73.1941 Equal Opportunities.

(a) General requirements. Except as otherwise indicated in Section 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities.

Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(1) Bona fide newscast;

(2) Bona fide news interview;

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) On-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a broadcasting station. (Section 315(a) of the Communications Act.)

(b) Uses. As used in this Section and Section 73.1942, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under Section 73.1941(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) Timing of Request. A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred:

Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) Burden of proof. A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) Discrimination between candidates. In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

4. Section 73.1942 is added to read as follows:

Section 73.1942 Lowest Unit Charge.

(a) Charges for use of stations. The charges, if any, made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

(i) A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(ii) The Commission recognizes non-preemptible, preemptible with notice, immediately preemptible and run-of-schedule as distinct classes of time.

(iii) Stations may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time-sensitive make goods. Stations may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(iv) Stations may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(v) Stations may treat non-preemptible and fixed position as distinct classes of time provided that stations articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Stations shall not establish a separate, premium-priced class of time sold only to candidates. Stations may sell higher-priced nonpreemptible or fixed time to candidates if such a class of time is made available on a *bona fide* basis to *both* candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower-priced class of time sold to commercial advertisers.

(vii) Unit rates charged for the last-minute sale ("fire sale") of available inventory must be included in the calculation of the lowest unit charge for all time sold to candidates during the period or daypart or program (regardless of when candidates originally purchased/ordered their spots), but such calculation establishes the lowest unit charge *only* for the period, daypart, or program in which such fire sale spots actually aired. Moreover, if a licensee permits candidates to use its broadcast facilities, such last minute sales must also be made available to candidates.

(viii) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Stations electing to calculate

the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Stations may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(ix) Stations shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, stations shall issue such rebates or credits promptly.

(x) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(xi) Stations are not required to include non-cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the licensee. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(xii) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a station has provided a time-sensitive make good to any commercial advertiser who purchased time in the same class during the pre-election periods, respectively set forth in paragraph (a)(1) of this section.

(xiii) Stations must disclose and make available to candidates any make good policies provided to commercial advertisers. If a station places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(2) At any time other than the respective periods set forth in paragraph (a)(1) of this section, stations may charge legally qualified candidates for public office no more than the charges made for comparable use of the station by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the station would charge for comparable commercial advertising.

(b) If a station permits a candidate to use its facilities, the station shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available to candidates. This duty includes an affirmative duty to disclose to candidates information about rates and all value-enhancing discount privileges offered commercial advertisers. Stations may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class;

(2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(3) A description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(4) An approximation of the likelihood of preemption for each kind of preemptible time; and

(5) An explanation of the station's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(c) Once disclosure is made, stations shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

(d) This rule (Section 73.1942) shall not apply to any station licensed for non-commercial operation.

5. Section 73.1943 is added to read as follows:

Section 73.1943 Political File.

(a) Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.

(b) When free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file.

(c) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

5. Section 73.1944 is added as follows:

Section 73.1944 Reasonable Access.

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Weekend Access. For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates *on the weekend before the election* if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

6. Section 73.1212 is amended by adding a last sentence to paragraph (a)(2)(i) to read as follows:

Section 73.1212(a)(2)(i) Sponsorship Identification

* * * * *

(a)(2)(i) * * * In the case of political television broadcasts under this paragraph and paragraph (d) of this section, the broadcast must contain both a visual and aural announcement.

* * * * *

1. The authority citation for Part 76 continues to read as follows: Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

2. Section 76.205 is revised in its entirety to read as follows:

Section 76.205 Origination Cablecasts by Legally Qualified Candidates for Public Office. Equal Opportunities.

(a) General requirements. No cable television system is required to permit the use of its facilities by any legally qualified candidate for public office, but if any system shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such system shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(1) Bona fide newscast;

(2) Bona fide news interview;

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) on-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a system. (Section 315(a) of the Communications Act.)

(b) Uses. As used in this Section and Section 76.206, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under Section 76.205(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) Timing of Request. A request for equal opportunities must be submitted to the system within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: *Provided, however,* That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) Burden of proof. A candidate requesting equal opportunities of the system or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) Discrimination between candidates. In making time available to candidates for public office, no system shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

3. Section 76.206 is added to read as follows:

Section 76.206 Lowest Unit Charge.

(a) Charges for use of cable television systems. The charges, if any, made for the use of any system by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the system for the same class and amount of time for the same period.

(i) A candidate shall be charged no more per unit than the system charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any system practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(ii) The Commission recognizes non-preemptible, preemptible with notice, immediately preemptible and run-of-schedule as distinct classes of time.

(iii) Systems may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guar-

anteed time-sensitive make goods. Systems may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(iv) Systems may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(v) Systems may treat non-preemptible and fixed position as distinct classes of time provided that systems articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Systems shall not establish a separate, premium-priced class of time sold only to candidates. Systems may sell higher-priced nonpreemptible or fixed time to candidates if such a class of time is made available on a *bona fide* basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower-priced class of time sold to commercial advertisers.

(vii) Unit rates charged for the last-minute sale ("fire sale") of available inventory must be included in the calculation of the lowest unit charge for all time sold to candidates during the period or daypart or program (regardless of when candidates originally purchased/ordered their spots), but such calculation establishes the lowest unit charge only for the period, daypart, or program in which such fire sale spots actually aired. Moreover, if a system permits candidates to use its cablecast facilities, such last minute sales must also be made available to candidates.

(viii) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Systems electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Systems may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(ix) Systems shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, systems shall issue such rebates or credits promptly.

(x) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(xi) Systems are not required to include non-cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the system. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(xii) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a system has provided a time-sensitive make good to any commercial advertiser who purchased time in the same class during the year preceding the pre-election periods, respectively set forth in paragraph (a)(1) of this section.

(xiii) Systems must disclose and make available to candidates any make good policies provided to commercial advertisers. If a system places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(2) At any time other than the respective periods set forth in paragraph (a)(1) of this section, systems may charge legally qualified candidates for public office no more than the charges made for comparable use of the system by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the system would charge for comparable commercial advertising.

(b) If a system permits a candidate to use its cablecast facilities, the system shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available to candidates. This duty includes an affirmative duty to fully disclose to candidates information about rates and all value-enhancing discount privileges offered commercial advertisers. Systems may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(1) A description and definition of each class of time available to commercial advertisers sufficiently complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(3) A description of the system's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(4) An approximation of the likelihood of preemption for each kind of preemptible time; and

(5) An explanation of the system's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(c) Once disclosure is made, systems shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

3. Section 76.207 is added to read as follows:

Section 76.207 Political File

(a) Every cable television system shall keep and permit public inspection of a complete and orderly record (political file) of all requests for cablecast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.

(b) When free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file.

(c) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

4. Section 76.221 is amended by adding a last sentence to paragraph (a) to read as follows:

Section 76.221(a) Sponsorship Identification; List Retention; Related Requirements.

* * * * *

(a) * * *In the case of political cablecasts under this paragraph and paragraph (c) of this section, the cablecast must contain both a visual and aural announcement.

* * * * *

Statement of Commissioner James H. Quello
Political Broadcasting Report and Order

Although only one item relating to our political broadcasting rules is on the Agenda, we are announcing a series of actions today. Taken together, the *Report and Order*, the *Declaratory Ruling* on jurisdiction and the enforcement actions should bring some order out of the chaos that lately has characterized our political broadcasting rules.

The *Report and Order* is a long overdue and welcome update and clarification of the Commission's rules governing political broadcasting, particularly those relating to lowest unit charge requirements. Advertising practices have changed radically over the past few years and our interpretations of the law had not kept pace. I believe that by codifying our policies, we will make our requirements more understandable to candidates and easier to apply by broadcasters. I want to congratulate the staff for the excellent job they did in preparing this difficult item.

The *Declaratory Ruling* consolidates jurisdiction over both liability and damages for Section 315(b) violations where it belongs and always has been — at the Commission. Although I think the *Ruling* establishes new complaint procedures without adequate opportunity for public comment, I can enthusiastically support it in all other respects. I am issuing today a separate statement on the *Declaratory Ruling*.

The series of enforcement actions announced today should end the confusion about the findings of last year's political broadcasting audit. Although I think the fines in some of the cases are higher than we have assessed for violations of other rules, I generally support them to help demonstrate the Commission's intent to enforce the law. It is also important to note that of the 30 stations audited, only two were found to have overcharged candidates. The other three fines were for political file violations.

I believe this record of compliance will improve. I think we will find that when our rules are clear, broadcasters are eager to comply.

December 12, 1991

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report and Order in MM Docket No. 91-168 Codification of the Commission's Political Broadcasting Policies

The revised political broadcasting rules we adopt today are both timely and significant because they should allow political candidates and broadcasters alike to easily discern their respective rights and obligations as we enter the 1992 election cycle. In particular, there should be no doubt after today that broadcasters have an affirmative duty to disclose all ad rates and sales practices to political candidates.

Full disclosure is an absolute must, for only through full disclosure can candidates, as well as the Commission, be assured that they are, in fact, receiving the same lowest unit charge as a station's most favored commercial advertiser.

Full disclosure will also remove the shroud of mystery (and controversy) surrounding the standard broadcast practice of offering different classes of advertising time for sale. Yet, even in the offering of such classes (or unit rates), one rule stands clear: for each class of time sold, political candidates must receive the station's lowest offered rate.

Our rules also make it clear that all classes of preemptible time offered by a station must be based on objective, discernible criteria and not the identity of the advertiser.

Also, with respect to rebates (and make-good obligations), our rules now mandate that they should be paid (or made good) promptly, which, in most cases will mean well before the applicable election. After all, in our current age of media-based political campaigns, receipt of several rebates before an election may make the difference between a successful candidate and an "also-ran".

To me, the most difficult decision in this item is whether to reverse our longstanding policy of allowing licensees to determine whether or not to accept political advertisements for insertion in newscasts. On the one hand, I can fully understand the desire of politicians to have access to newscasts -- they reach the highest audience of likely voters. On the other hand, broadcasters understandably feel that their journalistic integrity and First Amendment rights may be compromised if they are required to run political spots during newscasts. In the end, my decision to support retention of the current policy is

December 12, 1991

SEPARATE STATEMENT OF
COMMISSIONER ANDREW C. BARRETT

Re: Codification of the Commission's Political Programming Policies (MM Docket No. 91-168)

The political programming policies represent an important role for the Federal Communications Commission in the electoral process. Our policies effectuate the Congressional mandate to provide candidates "equal opportunities" and the "lowest unit charge" during the primary and general election phases. In light of the importance of political advertisement to an informed electorate and given the lack of clear guidelines from the Commission to handle todays media marketplace, it is fitting that we revise and clarify these policies. I have fully supported this review and support the Report and Order adopted today. I believe it will prove to be one of the most important items this Commission will handle on the mass media front. In addition, I am pleased that we establish an ongoing mechanism whereby the public can be kept informed of changes made to the interpretations of the political policies and rules in response to the evolving sales practices of broadcast stations.

I write separately to make clear to broadcasters, candidates, and the public my position on enforcement of these new policies. It has been suggested that our Preemption Declaratory Ruling adopted today and our new policies adopted in this Report and Order are an attempt to protect broadcasters. I can unequivocally state that the protection of broadcasters has not been a goal of mine. Throughout this process, my objective has been to devise a workable set of policies that clearly set forth the obligations of broadcasters and to enforce these policies.[1] I feel that leaving it to the state or federal court to enforce the political broadcast rules could be considered an abdication of my responsibility as a Commissioner. Congress established the political broadcast rules and provided for Commission implementation. It is our duty as public officials to fully comply with this mandate. A necessary corollary of that implementation mandate is the enforcement of the political broadcast policies and rules.

---

[1] In this regard, I note that today the Commission has completed the enforcement action in relation to the thirty audited stations. Where necessary and legally sustainable, the Commission has issued forfeitures and required that the stations rebate candidates.

December 12, 1991

SEPARATE STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Codification of the Commission's Political Broadcasting Policies (MM Docket No. 91-168)

This Report and Order represents a victory for virtually everyone affected by the political broadcasting provisions of the Communications Act. Broadcasters benefit from the considerable degree of clarity, consistency and coherence that we now lend to the Commission's complex, but vitally important, political rules. Candidates benefit from policy revisions which require that broadcast licensees provide political campaigns with full and complete disclosure of stations' commercial advertising practices, a major step toward ensuring that candidates receive the required lowest unit charge for their own spots. Finally, because this action cannot help but improve the delivery of political messages through broadcasting and cable outlets, the American voters are the ultimate beneficiaries.

In two related initiatives, we also are moving within our mandate under the Communications Act to bring enforcement of the Commission's policies under our exclusive jurisdiction, and we are making specific findings of apparent liability for violations discovered during the 1990 Political Audit. Through our jurisdictional ruling, we assure candidates and broadcasters alike that we intend to resolve political broadcasting complaints fairly and expeditiously through Commission procedures. In addition, our enforcement actions stemming from the Audit demonstrate our resolve to ensure that stations adhere to the letter and spirit of the law.

These actions are the product of spirited debate and considerable deliberation. The result is a carefully reasoned set of decisions that should provide clear guideposts in this sensitive area.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 13, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC BELL & NEVADA BELL SUPPLEMENTAL PETITIONS FOR WAIVER OF ONA TARIFFING ORDERS

CC Docket No. 89-79
CC Docket No. 88-2

On December 24, 1991 Pacific Bell and Nevada Bell filed supplemental petitions for waiver of the Commission's ONA tariffing orders in CC Docket Nos. 88-2 and 89-79, which required the BOCs to file federal tariffs for all of the basic service elements listed in their approved ONA plans. These waiver petitions request that Pacific Bell and Nevada Bell be permitted not to federally tariff those individual basic service elements that they believe are technically infeasible or otherwise impractical to tariff.

Interested parties should file comments on the petitions by **January 28, 1992,** and reply comments by **February 7, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: January 15, 1992; Released: January 15, 1992

By the Chief, Common Carrier Bureau:

1. In an Order adopted November 5, 1991, the Commission found that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Company (Vitelco) between January 2, 1990 and June 30, 1990 were unlawful to the extent those rates exceed rates in effect prior to January 2, 1990. The Commission therefore ordered Vitelco to issue refunds with interest within 60 days of the release of the *December 16 Order*.[1] The Commission also directed Vitelco to file a report describing Vitelco's efforts to effectuate these refunds within 30 days of the release of that Order.

2. On January 3, 1992, Vitelco filed a motion to stay the refund requirement imposed upon it by the *December 16 Order*. Vitelco also seeks to stay the requirement that it file a report on its plan to effectuate the refund, or, at a minimum, be given an additional 60 days to comply with the refund reporting requirements in the *December 16 Order*.

3. Pending a decision on Vitelco's request to stay the refund requirement, we grant Vitelco's motion in part to delay the January 15, 1992 report. Specifically, we allow Vitelco an additional 30 days in which to file its report with the Commission which describes its efforts to effectuate refunds ordered in the *December 16 Order*. In doing so, we are relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

4. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 4(i), that the Virgin Islands Telephone Company IS GRANTED an extension of time until February 14, 1992, to file a report with the Commission which describes its efforts to effectuate the refunds ordered in the above-captioned docket.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, FCC 91-351, rel. Dec. 16, 1991 (*December 16 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54 - 63.58

ORDER

Adopted: January 15, 1992; Released: January 16, 1992

Comment Date: February 3, 1992
Reply Comment Date: March 5, 1992

By the Chief, Common Carrier Bureau:

1. On January 3, 1992, the Motion Picture Association of America, Inc., the Association of Independent Television Stations, Inc., and the Ameritech Operating Companies (hereafter "MPAA") filed a Motion for Extension of Time requesting that the date for filing comments in this proceeding be extended twenty-eight (28) days, from January 23, 1992 to February 20, 1992, and that the date for reply comments likewise be extended twenty-eight (28) days, from February 24, 1992 to March 23, 1992. In this Order, we grant MPAA's motion in part.

2. In the most recent order in this proceeding, the Commission proposed to modify its rules to permit local telephone companies to provide video dialtone.[1] In this regard, the Commission asked parties to comment upon, among other things, the nature of services and markets which may develop as a technologically advanced network develops under the video dialtone model and the benefits and costs of proceeding with video dialtone at this time. The Commission also sought comment on proposed rule changes which may be necessary and/or desirable in order to implement video dialtone consistent with the objectives of non-discrimination, ease of use, and flexibility.[2]

3. In its motion, MPAA argues that an extension of twenty-eight days for filing comments and reply comments is needed so that it can fully consider the "technological and regulatory requirements of such service."[3] MPAA asserts that the resolution of the issues in this proceeding could radically affect "how video programming is distributed to consumers in the United States and... the competitive balance in the video distribution business."[4] MPAA further contends that it represents broad interests and is therefore in an "especially unique position" to provide expert analysis on the issues in this proceeding.[5]

4. Under section 1.46 of our rules, it is the policy of the Commission that extensions of time are not routinely granted.[6] We believe, however, that a brief extension of the deadlines for filing comments and reply comments in this proceeding is reasonable in light of the scope of the technological and regulatory issues involved. Accordingly, we will grant the motion and extend the deadline for filing initial comments to February 3, 1992 and the deadline for filing replies to March 5, 1992.

5. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by the Motion Picture Association of America, Inc., the Association of Independent Television Stations, Inc. and the Ameritech Operating Companies is GRANTED to the extent set forth herein.

6. Accordingly, IT IS THEREFORE ORDERED, pursuant to the authority found in sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and sections 0.91, 0.291 and 1.46 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.46, that the times for filing comments and reply comments in this proceeding ARE EXTENDED to **February 3, 1992** and **March 5, 1992,** respectively.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, CC Docket No. 87-266, FCC No. 91-334, released Nov. 22, 1991, at paras. 13 - 19.

[2] *Id.* at paras. 23 - 40.

[3] Motion for Extension of Time, filed January 3, 1992, at 2.

[4] *Id.* .

[5] *Id.* at 3.

[6] 47 C.F.R. Sec. 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 16, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S PETITION FOR WAIVER OF THE PART 69 TRANSPORT RULES

On December 19, 1991, GTE service Corporation (GTE) filed a petition for waiver of the Part 69 rules to permit GTE California Incorporated (GTEC) to offer a flat-rate dedicated transport service on an interim basis for all end offices served by GTEC tandems in Local Access Transport Area (LATA) 5 in southern California. Currently, the Commission requires that the Bell Operating Companies and GTE price local transport service on an "equal charge per unit of traffic" basis pending completion of the *Transport* proceeding, CC Docket No. 91-213.

In its petition, GTE states that it must implement a dedicated transport option immediately in order to meet the significant competition for switched transport service in GTEC's LATA 5. According to GTE, several major access customers have bypassed GTEC's switched access transport service or have purchased service from alternative vendors who lease and then resell GTEC's facilities. GTE states that the requested waiver would permit GTEC to provide dedicated facilities to its customers on the same basis as alternative providers. GTE states that without the waiver, GTEC and its switched access customers will be significantly harmed.

Under the waiver, GTEC would use the current special access rates and structure for the entrance facility and interoffice portions of the service, and the current switched transport rates and structure for the end office components. GTE states that its offering would be available to all customers in LATA 5 and would not decrease the range of services available to current customers. GTE also states that grant of the waiver would not prejudice the Commission's decision in any open docket related to this issue because its proposed offering would be an interim measure in one market area. Interested parties are to file comments on this petition by **February 18, 1992,** and reply comments by **March 10, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Melissa E. Newman, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037, (202) 452-1422.

For further information contact Melissa E. Newman, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-9342.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

METROMEDIA COMPANY — File No. 00420-CL-TC-1-91

For Transfer of Control of AWACS, Inc., licensee of Station KNKA382, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 4, Philadelphia, Pennsylvania MSA

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1992; Released: January 16, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. In this Order, we address Petitions to Deny filed by United States Cellular Corporation (USCC) and its subsidiary, Vineland Cellular Telephone Company (Vineland) (jointly, USCC), and Midland Communications Corp. (Midland), and an "Objection to Transfer" filed by Howell Spear (Spear). All request that the above captioned application to transfer control of AWACS, Inc. (AWACS) from Metromedia Company (Metromedia) to Comcast Cellular Communications, Inc. (Comcast) be denied. For the reasons discussed below, we deny USCC's and Midland's petitions and Spear's objection and grant the subject application.

II. DISCUSSION

2. USCC contends that Comcast should not be allowed to acquire control of the non-wireline cellular system in Philadelphia because of its conduct with regard to the non-wireline system in Atlantic City, New Jersey. According to USCC, Comcast has willfully concealed material facts from the Commission and assumed unauthorized control of the Atlantic City system. Consequently, USCC argues that Comcast's deliberate violation of the Communications Act of 1934 (the Act) and of the Commission's rules and Comcast's lack of candor in dealing with the Commission demonstrate that it does not posses the character qualifications the Commission requires of its licensees.

3. USCC claims it has standing to file its petition to deny because Vineland will suffer economic harm if Comcast is allowed to acquire control of AWACS and thus the Philadelphia system. USCC imparts that Vineland is the licensee of the non-wireline cellular system in the Vineland-Millville-Bridgeton, New Jersey Metropolitan Statistical Area (MSA), which it says is a small market surrounded by the three much larger markets of Philadelphia, Atlantic City and Wilmington, Delaware. The non-wireline cellular systems in the latter two markets, says USCC, are effectively controlled by Comcast. These systems acting in concert, says USCC, have used their combined dominant market position to force Vineland to accept lower rates from their customers roaming in Vineland's MSA than those Vineland currently receives from customers of the Philadelphia system roaming in its MSA.[1] Should Comcast acquire control of the Philadelphia market, USCC foresees Vineland being pressured to lower the rates it charges roamers from Philadelphia as well. Revenues obtained from roamers, says USCC, are critical to Vineland's economic survival. Consequently, it submits that if Comcast acquires control of the Philadelphia system Vineland will suffer substantially.

4. Midland also bases its claim to standing on anticipated economic harm from Comcast. Midland explains that it is the licensee of the non-wireline cellular system in the New Jersey 2 (Ocean) Rural Service Area (RSA), which, like the Vineland-Millville-Bridgeton MSA, is surrounded by cellular systems that Comcast either owns or controls, or has agreements to own or control, thereby giving it considerable power with respect to Midland's RSA. Comcast and its affiliates, says Midland, have abused and threatens to further abuse that power in the event it is allowed to acquire control of the Philadelphia system. The past abuses cited are that Comcast has disparaged the service offered by Midland while it attempted to acquire customers away from Midland; delayed registration of Midland roamers; interfered with Midland's securing transmitter sites; refused to cooperate in testing for coordination of frequency use with Midland; and breached an agreement it negotiated with Midland. The underlying motivation for these abuses, says Midland, was simply to realize the economic benefits of capturing potential Ocean RSA customers, and it, therefore, follows that allowing Comcast to increase it market power will lead to even greater economic abuses against Midland.

5. Midland contends that Comcast's conduct also raises substantial questions concerning Comcast's character qualifications. According to Midland, Comcast's actions reveal a discernible pattern of predatory behavior, and this character flaw is confirmed when the serious allegations, involving Comcast's lack of candor and its unauthorized assumption of control, presented in the pending Atlantic City proceeding, are taken into consideration.

6. In addition, says Midland, Comcast has failed to demonstrate that it is financially qualified to acquire control of AWACS. Principally, Midland takes issue with a letter, jointly provided to Comcast by Barclays Bank PLC, Provident National Bank, The Chase Manhattan National Bank, N.A. and The Toronto-Dominion Bank (Bank Letter), and a second letter provided to Comcast by Lazard Freres & Co. (Lazard Letter), each of which was independently submitted by Comcast as evidence that it has acquired reasonable assurance that funds will be available to enable it to purchase and operate AWACS' system. Midland claims that neither letter meets the Commission's reasonable assurance requirement.

7. Spear, unlike his fellow petitioners, makes no specific assertion of standing. He identifies himself as one of Midland's minority shareholders and he accuses Comcast of anticompetitive behavior exemplified by the same conduct alleged by Midland.

8. In response to USCC's and Midland's petitions and Spear's objection, Comcast argues that none has demonstrated standing to formally oppose the subject application. Comcast points out that USCC's claim to standing is based on unproven allegations in a separate proceeding, Midland's claim fails to demonstrate how it will be injured by the proposed transfer of control, and Spear has made no attempt to establish that he has standing. Therefore, Comcast contends that all should be dismissed out of hand.

9. Regarding the substantive allegations presented by each of the contestants, Comcast and Metromedia (jointly, the Applicants) contend that all are baseless. USCC's petition, say the Applicants, is an improper attempt by it to reargue allegations that it and its parent, Telephone and Data Systems, Inc., have presented to the Commission in a pending Application for Review, in which USCC and TDS allege that American Cellular Network Corp. (Amcell), a subsidiary of Comcast, has illegally assumed control of the Atlantic City cellular system from its licensee, Ellis Thompson Corporation, and that Amcell has attempted to conceal this fact from the Commission.[2] The Applicants submit that these allegations, aside from being unproven, are irrelevant to the matter at hand, namely Comcast's qualifications to operate the Philadelphia cellular system. Consequently they contend that USCC's petition should be dismissed. Similarly, the Applicants contend that Midland's and Spear's allegations of anticompetitive behavior are equally untenable. Citing the Commission's *Character Policy Statement*,[3] the Applicants note that there has been no adjudication of anticompetitive conduct by Comcast or its subsidiaries, and the failure to provide such evidence vitiates Midland's and Spear's allegations. Lastly, Comcast alone addresses Midland's allegations concerning Comcast's financial qualifications. It says that although the financial information contained in its application, as it was originally filed, clearly met the Commission's requirements, it amended its financial showing to demonstrate unequivocally that it has reasonable assurance that it will have access to funds far in excess of those needed to consummate the transfer. The cash required for the transaction, says Comcast, is $300 million. However, the Bank Letter, as revised, expresses the banks' familiarity with the proposed transaction and their willingness to make a loan of $350 million. Correspondingly, the Lazard Letter assures Comcast, independently from the banks, that it is confident that it can arrange financing through debt and equity placement to raise at least $350 million. In this regard, Comcast also notes that Lazard Freres & Co. is a leading investment banking firm with extensive experience in the communications industry. It is therefore apparent, says Comcast, that it is financially qualified to purchase and operate the Philadelphia system.

10. *Standing*: Section 309(d)(1) of the Act requires that a party filing a petition to deny an application have standing as a "party-in-interest". Standing is imparted when a petitioner is able to show that injury in fact will result from the challenged action, and that the interest in question lies within the zone of interests to be protected by the Commission. *Cable TV Relay Services - CARS (402)*, 68 FCC 2d 696, 699 (1978).

11. We are not persuaded that USCC or Spear has standing to contest this transfer of control application. Spear has made no attempt to establish standing, and the injury envisioned by USCC is insufficient to confer standing. Essentially, USCC contends that if Comcast acquires control of AWACS, USCC will no longer be afforded the favorable roamer rates that it is now receiving from the Philadelphia system. This allegation is speculative at best and it is by no means clear that the Commission would remedy a change in roamer rates in any event. On the other hand, Midland, we believe, has made a threshold demonstration of standing. It has alleged specific instances of anticompetitive conduct by Comcast, which, if proven, would warrant concern that an increase in Comcast's market power, stemming from its acquisition of the Philadelphia cellular system, might result in injury to Midland.

12. *Atlantic City proceeding*: As mentioned previously, all of the allegations contained in USCC's petition and part of those contained in Midland's concern an alleged unauthorized transfer of *de facto* control of a licensee located in another market. Consequently these are collateral issues that are the subject matter of another pending Commission proceeding. *Ellis Thompson, supra*. Nevertheless, we have reviewed the allegations and find that the licensee has not relinquished control of the Atlantic City cellular system.

13. *Anticompetitive conduct*: Also premature and thus irrelevant to the matter at hand are Midland's and Spear's allegations of anticompetitive behavior. We note that neither Midland nor Spear claims that Comcast has been found guilty by any court or government agency of any form of anticompetitive activities, or for that matter that any such claim against it is even pending. We, therefore, will not entertain either party's allegations concerning this issue.

14. *Financial qualifications*: Section 308(b) of the Act requires, *inter alia*, that an applicant seeking to acquire a facility licensed by the Commission demonstrate that it is financially qualified to do so. In those cases involving cellular radio transfers, such as the one before us, this obligation is satisfied if the transferee demonstrates that it has "reasonable assurance" of the availability of funds. *See, e.g., MMM Holdings, Inc.*, 4 FCC Rcd 6842 (Com. Car. and Mass Med. Burs. 1989), *aff'd*, 4 FCC Rcd 8243 (1989). Comcast has made such as demonstration. We are advised that Comcast must raise $300 million to consummate the proposed transfer of control. In this regard, Comcast has provided the Commission with the Bank Letter and the Lazard Letter, each stating that no less than $350 million will be available for the proposed transaction. Furthermore, each instrument meets the Commission's "reasonable assurance" requirement. The Bank Letter, which expresses a general satisfaction with Comcast's viability, is jointly signed by four separate lending institutions, serving as agents and participating banks. It states the banks' willingness to make a loan totalling $350 million to Comcast's subsidiary, Amcell, for the purpose of acquiring controlling interest in AWACS from Metromedia, provided all requisite credit and documentation requirements are satisfactorily met. The letter explains that they intend to create a syndicate in which additional banks will also participate in the provision of the loan. In light of their familiarity with the mobile communications industry generally and with the management, operations and financial condition of Comcast and Amcell in particular, as well as their review of AWACS' audited financial statements, they state that they are confident that there will be a sufficient number of banks willing to participate in the loan. Similarly, the Lazard Letter states that based on its experience in underwriting

and privately placing corporate debt, equity and equity-related securities, its knowledge of Comcast and its subsidiaries, the opportunities presented by acquiring control of AWACS, and the success Comcast has had in acquiring and operating cellular telephone businesses in the past, it is confident that Comcast can reasonably expect to obtain $350 million through a private or public debt or equity placement as an alternative to bank financing. The Lazard Letter, like the Bank Letter, expresses a familiarity with the mobile communications industry generally and with the management, operations and financial condition of Comcast in particular, adding that since 1986, the firm has been a principal underwriter in approximately $500 million in equity and debt financing for Comcast. In conclusion, the letter states that based upon current market conditions Lazard could arrange for Comcast to raise a least $350 million of financing to fund the acquisition of AWACS. In view of the foregoing, we are unpersuaded by Midland's claims that the Bank and Lazard Letters are insufficient to meet the "reasonable assurance" standard.

III. CONCLUSION

15. In view of the foregoing discussion, we find that none of the parties have made a *prima facie* demonstration that Comcast is not fully qualified to acquire control of AWACS from Metromedia.

IV. ORDERING PARAGRAPHS

16. Accordingly, IT IS ORDERED THAT the Petitions to Deny filed by United States Cellular Corporation and Vineland Cellular Telephone Company and Midland Communications Corp. and the "Object to Transfer" filed by Howell Spear ARE DISMISSED.

17. IT IS FURTHER ORDERED THAT the application of Metromedia Company and Comcast Cellular Communications, Inc. (File No. 00420-CL-TC-1-91) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] A subscriber to one cellular system who is visiting in another market is said to be "roaming". The switch in the market the roamer is visiting will allow the roamer to use his phone provided the switch operator has a roaming agreement with his home operator.

[2] *See* Supplement to Application for Review of *Ellis Thompson*, 4 FCC Rcd 2599 (Com.Car.Bur. 1989), filed by TDS and USCC on April 17, 1991.

[3] *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

POLAR COMMUNICATIONS CORP. File No. I-T-C-91-229

Application for authority to operate as an international resale carrier.

AMER-I-NET SERVICES, CORP. File No. I-T-C-91-230

Application for authority to operate as an international resale carrier.

ALEXACALL File No. I-T-C-92-001

Application for authority to operate as an international resale carrier.

INTERLINK TELECOMMUNICATIONS, INC. File No. I-T-C-92-002

Application for authority to operate as an international resale carrier.

TELEKEY, INC. File No. I-T-C-92-003

Application for authority to operate as an international resale carrier.

HOSPITALITY COMMUNICATIONS, INC. File No. I-T-C-92-004

Application for authority to operate as an international resale carrier.

MIS ASSOCIATES, INC. File No. I-T-C-92-010

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 13, 1992; Released: January 24, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Polar Communications, Corp. (Polar), Amer-I-Net Services, Corp. (ANSC), Alexacall, Interlink Telecommunications, Inc. (Interlink), TeleKey, Inc., Hospitality Communications, Inc. (HCI) and MIS Associates, Inc. (MIS).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-229, I-T-C-91-230, I-T-C-92-001, I-T-C-92-002, I-T-C-92-003, I-T-C-92-004 and I-T-C-92-010 ARE GRANTED; and

a. Polar and ANSC are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, and Cable and Wireless' Tariff F.C.C. No. 3 between the U.S. and the international points listed in those tariffs;

b. Alexacall and HCI are authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff;

c. Interlink is authorized to provide international switched voice service by the resale of the switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and Executive Telecard F.C.C. Tariff No. 1 between the U.S. and the international points listed in those tariffs;

d. TeleKey is authorized to provide international switched voice service by the resale of the switched voice services set forth in Feek's Tariff F.C.C. No. 1, AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs; and

e. MIS is authorized to provide international switched voice service by the resale of the switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 and MCI's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the

services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the
Commission's Rules Relating to
License Renewals in the Domestic
Public Cellular Radio
Telecommunications Service

REPORT AND ORDER

Adopted: December 12, 1991; Released: January 9, 1991

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. In our Notice of Proposed Rule Making (Notice), 5 FCC Rcd 5593, released September 19, 1990, we proposed to establish standards for conducting comparative renewal proceedings between an applicant seeking renewal of its license in the Domestic Public Cellular Radio Telecommunications Service (cellular radio service) and challengers filing competing applications. Specifically, we explained that we intended to: (1) establish criteria for comparing the renewal applicant and any challengers, including possible standards for awarding a major comparative preference to a licensee for its performance during its license term, known as a renewal expectancy; (2) establish basic qualifications standards for challengers; and (3) provide procedures for preventing possible abuses in the comparative renewal process.[1] Twenty-eight parties filed Comments in response to our Notice and nineteen parties filed Reply Comments.[2] The majority of the commenters expressed support for most of our tentative conclusions. With certain modifications, this Report and Order adopts all of our tentative conclusions, except our proposal for a bifurcated renewal hearing procedure.[3] We have decided to award a rebuttable presumption of a renewal expectancy preference to those renewal applicants who demonstrate a *prima facie* case under the standards set forth in our new rules.

II. ISSUE ANALYSIS

2. Our Notice raised several issues concerning comparative cellular renewal proceedings. Additional issues and proposals were raised by the parties who filed Comments and Reply Comments to our Notice. First, we will discuss the commenters' arguments concerning the reasons for creating a renewal expectancy for cellular licensees, the criteria for earning such an expectancy, and the showing required to demonstrate a licensee's compliance with those criteria. Second, we will consider other possible comparative issues appropriate for a cellular renewal proceeding. Third, we will examine basic qualifications standards for challenging applicants in a cellular renewal proceeding. Fourth, we will discuss additional rules whose purpose is to prevent abuses of the comparative cellular renewal process. Lastly, we will consider what type of hearing procedures would be most advantageous for comparative cellular renewal proceedings.

Renewal Expectancy

3. In our Notice, we tentatively concluded that the public interest would be served by granting a significant comparative preference in comparative cellular renewal proceedings, which we term a renewal expectancy, to cellular radio licensees whose performance during the past license term has met certain standards. This renewal expectancy would be the most important factor to be considered in comparing the licensee with any competing applications. In paragraph 8 of our Notice, we tentatively concluded that granting renewal expectancies in the cellular radio service for the past performance of licensees would accomplish the public interest objectives of: (1) encouraging investment in facilities; (2) avoiding the replacement of an acceptable service provider with an inferior one, based on unproven promises and (3) ensuring continuity of service. All of the commenters except for the National Cellular Resellers Association (NCRA), concurred with the foregoing analysis. NCRA, which is a nationwide association of non-facilities-based resellers of cellular radio service, claims that the Commission has failed to explain the correlation between the "public interest, convenience, and necessity" standard for renewing licenses, which is contained in Section 307 of the Communications Act of 1934, as amended (the Act), and the objectives it seeks to achieve in establishing a renewal expectancy policy. For the reasons stated *infra*, we reject NCRA's arguments in this regard.

4. With respect to continuity of service, NCRA asserts that the possibility of a temporary service disruption exists whenever one licensee is replaced by another and that avoidance of such a disruption should not be part of any renewal expectancy policy because the incumbent licensee would always be favored, in contravention of the Act. We believe that the continuity of service objective is justified by the nature of cellular radio service. Cellular subscribers are dependent upon their service provider and its established offerings and geographic coverage. Interruption to cellular services currently relied upon by the public could have a significant, adverse effect upon the ability of many persons, including medical, police and safety personnel, to conduct their activities. Thus, users of cellular radio depend upon that service to communicate on a daily basis with various customers, family members, and fellow professionals including police officers and medical personnel. Further, each cellular market is served by only two facilities-based cellular providers. *See La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233 (D.C. Cir. 1990).

5. NCRA states that the Commission has provided no reason why a renewal expectancy is needed to spur publicly beneficial investment because (1) our rules require cellular applicants to demonstrate sufficient financial resources to construct and operate a cellular system and (2) the growing demand for cellular service creates a powerful, profit-based incentive to invest. NCRA's arguments ignore one of our chief reasons for awarding a renewal expectancy, namely, to encourage continuous investment

in cellular facilities which will endure beyond the license term of a particular cellular licensee. Thus, the fact that we require cellular applicants to demonstrate their ability to construct and operate their initial systems is irrelevant to the need for cellular operators to make further investments in cellular facilities after their initial system is constructed to enable those operators to "build out" their systems by adding more cells to meet customer demand.

6. Further, the argument that growing demand for cellular service creates a powerful, profit-based incentive to invest assumes that investments made during a particular license term can be recovered during that term. In fact, as McCaw Cellular Communications, Inc. (McCaw) states, the costs of constructing and expanding facilities, implementing more spectrum efficient technologies, and developing new service offerings require expenditures by the licensees that may not be recoverable before the license term expires.[4] As we explained in paragraph 8 of our Notice, the provision of high quality cellular service requires enormous capital expenditures and cellular technology requires that cellular systems evolve and grow if cellular companies are to continue providing beneficial service. Further, as McCaw mentions, a licensee must be able to attract investors and other sources of financing and a renewal expectancy will serve as an assurance to outside sources that their funds will not be placed in unreasonable jeopardy by the regulatory process.[5] Therefore, we conclude that renewal expectancies are necessary to encourage continuing investments in cellular facilities and thus stimulate licensees to "build out" their systems, as well as to provide assurance to investors and other sources of financing that their funds will not be placed in unreasonable jeopardy.

7. Next, NCRA challenges our objective of avoiding the replacement of an adequate service provider with an inferior one, based on unproven promises. It argues that issues in cellular licensing proceedings are likely to be of a technical nature or will lend themselves to objective analysis to a far greater degree than issues that arise in broadcast proceedings, such as the relative merits of particular programming. We disagree. As McCaw states at page 11 of its Reply Comments, claims about competing cellular service offerings, like claims about broadcast service, have a subjective nature about them that defies precise measurement. Further, as McCaw explains, there is no single "correct" technical way to provide cellular service that can be objectively measured. Moreover, a comparison of a licensee's cellular system with a paper proposal will involve the Commission in decision-making that is necessarily subjective. Thus, a substantial risk remains that an adequate service provider could be replaced by an inferior one, based simply on the promises of the challenger. In conclusion, we believe that the public interest, convenience and necessity would be well served by awarding renewal expectancies to cellular radio licensees whose past performance meets certain public interest standards.

8. In paragraph 9 of our Notice, we tentatively concluded that if a cellular licensee had (1) substantially used its spectrum for its intended purpose; (2) substantially complied with applicable Commission rules, policies and the Communications Act; and (3) had not otherwise engaged in substantial relevant misconduct, it should receive a renewal expectancy. We have decided to adopt the foregoing criteria for determining whether or not a licensee deserves a renewal expectancy.

9. With respect to the first of the three foregoing criteria, we believe that a cellular radio licensee which has constructed and operated its cellular system in accordance with our rules and policies and expanded the coverage of that system in accordance with Commission rules has "substantially used its spectrum for its intended purpose." Basically, such a licensee will have provided the high level of service anticipated by the Commission when it first inaugurated the cellular radio service. The Commission's rules and policies for the cellular service mandate the provision of quality service to the public. The Commission's policy has been to encourage the creation of a nationwide, seamless system, interconnected with the public switched network so that cellular and landline telephone customers can communicate with each other on a universal basis. Among the Commission's policies promoting this goal are: (1) minimum coverage requirements, 47 C.F.R. Section 22.903; (2) universal system compatibility standards, *id.*, Section 22.915; (3) provision of exclusive five-year fill-in periods to promote unfettered expansion of systems, *id.*, Section 22.31(a)(1)(i); (4) licensing of unserved areas, *id.*, Section 22.902(b)(3), and (5) requiring the accommodation of roaming traffic, *id.*, Section 22.911(b). Therefore, at the inception of the cellular radio service, the Commission established operational and technical standards to promote the provision of high-quality service to the public. Substantial use of the spectrum in providing service to the public in accordance with these standards should be rewarded by granting a renewal expectancy to incumbents who can meet this criterion and the other two prongs of the standard we adopt today.

10. The second criterion for receiving a renewal expectancy requires that a licensee must have substantially complied with applicable Commission rules, policies and the Communications Act. Pursuant to this criterion, the Commission determines whether a cellular radio licensee has demonstrated a pattern of compliance with Commission rules and policies and the Communications Act. The criterion does not require a perfect record of compliance, but if a licensee has demonstrated a pattern of noncompliance with our rules or policies, it will not receive a renewal expectancy.

11. The third criterion requires that a licensee must not have engaged in substantial relevant misconduct other than the misconduct forbidden by the second criterion. Thus, the third criterion covers what we have described as "relevant non-FCC misconduct" in our recent *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC 3252 (1990) (*Character Policy Statement II*); *recon. denied*, 6 FCC Rcd 3448 (1991); *petitions for recon. pending*. For purposes of this third criterion, we include the following in our consideration of "relevant non-FCC misconduct;" (a) fraudulent misrepresentations to governmental units; (b) criminal misconduct involving false statements or dishonesty; (c) misconduct constituting a felony;[6] and (d) adjudicated violations of antitrust or anticompetitive laws involving communications services. Categories (a), (b) and (c) are also included in our *Character Policy Statement II*. Since our *Character Policy Statement II* is directed primarily at broadcast licensees, it includes adjudicated violations of antitrust or anticompetitive laws involving any media of mass communications under the category of "non-FCC misconduct." Although cellular radio is not a medium of mass media, we have no rules or policies prohibiting a broad-

cast licensee from holding cellular radio licensees. Thus, a broadcaster can be a cellular operator. Further, many of our cellular licensees are also involved in the provision of landline telephone service. Thus, since cellular licensees can be involved in various types of communications services, we shall consider adjudicated antitrust or anticompetitive violations by a cellular licensee insofar as they involve communications services.

12. NCRA argues that our new criteria for awarding a renewal expectancy are insufficient and that compliance with those criteria would merely weed out incumbents who are unfit to be licensees. NCRA claims that renewal expectancies should only be awarded for "superior performance," which has been defined to mean "far above average," citing *Citizens Communications Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1971) (*Citizens*). We note that this analysis ignores the later line of court cases which did not require "superior" service to justify the award of a renewal expectancy. *See Cowles Broadcasting, Inc.*, 86 F.C.C.2d 993 (1981) (*Cowles*), *aff'd sub nom. Central Florida Enterprises Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). In addition, in view of the unique character of the cellular industry, we believe that our new criteria for determining whether a cellular radio licensee deserves a renewal expectancy are a reasonable exercise of our discretion and are consistent with Sections 307 and 309 of the Communications Act. A cellular radio licensee who meets our new criteria will be rewarded for providing the high level of service anticipated by the Commission when it inaugurated the cellular radio service.

13. NCRA asserts that a licensee should earn a renewal expectancy by making a positive showing that it has taken "affirmative steps, over and above those required by the rules, to promote competition in the cellular marketplace or otherwise benefit consumers."[7] NCRA also suggests the following ways a licensee could make such a showing: (1) demonstrate that it had promoted competitive opportunities by establishing separate wholesale and retail operations and implementing economically rational policies relating to the allocation of wholesale and resale costs, thereby providing strong evidence that its wholesale and retail rates were just and reasonable; (2) show that it made unbundled cellular service available on a non-discriminatory basis at bulk rates and thus promoted competitive resale opportunities; (3) demonstrate superior performance by showing that its service quality standards (*e.g.*, blocking rates) significantly exceed those of similarly situated licensees; or (4) demonstrate that it had continually invested significant percentages of service revenues in new technologies deployed in its network which enabled it to provide superior quality services to its customers.

14. With regard to NCRA's premise that we should consider affirmative steps taken by a licensee to promote competition in the cellular marketplace, we believe that our rules, together with the competition between cellular licensees in the same market, are adequate to ensure that the cellular marketplace is competitive. In particular, it is not appropriate to include NCRA's first standard as a criterion for determining whether or not a licensee deserves a renewal expectancy. The Commission has already rejected NCRA's request to require cellular radio licensees to establish separate wholesale and retail operations in *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 6 FCC Rcd 1719 (1990).[8] NCRA's second standard for imposing "unbundling" requirements upon cellular licensees is being considered in a separate rule making proceeding.[9] Once the Commission has determined the result in that proceeding, any applicable rules and policies articulated therein will be matters which we shall consider in evaluating a licensee's future performance. In short, it is premature to include NCRA's second standard as a means of demonstrating a licensee's entitlement to a renewal expectancy.

15. NCRA's third proposed standard concerning service quality standards is also inappropriate. It would be unreasonably burdensome and potentially meaningless to require a licensee to have better blocking rates than other licensees in order to obtain a renewal expectancy. In this regard, when the Commission allocated more than three hundred frequencies for each cellular radio block (A and B), it anticipated that a licensee would be able to avoid congestion on its cellular system because of the availability of a multiplicity of channels. Thus, a cellular licensee does not need to obtain authority from the Commission to utilize new channels, whereas conventional land mobile radio common carriers must. *See, e.g*, Section 22.516 of our rules. Nevertheless, some systems which serve extremely populous areas, like New York City and Los Angeles, might have greater congestion (or blocking rates) on some frequencies than systems serving rural areas. It would be unfair to penalize such licensees simply because their systems cannot accommodate all potential users at the same time. In brief, the Commission currently has no rules prescribing blocking rates for cellular radio and has never found the need to develop such rules. *See, e.g., Cellular Communications Systems*, 86 FCC 2d 469, 508-09 (1981) (further citations omitted). The Commission would consider, however, whether the licensee was providing service to the public in accordance with the Commission's rules as part of its review to determine whether a licensee deserves a renewal expectancy. As to NCRA's fourth proposed standard concerning whether or not a licensee invested significant percentages of its revenues in new technologies or improving its cellular system, we believe that this standard would favor "large" cellular licensees who have greater revenues over small operators who receive fewer revenues. Nevertheless, we shall consider a licensee's investment in its cellular system, whether derived from profits or elsewhere, as evidence that it has "substantially used its spectrum for its intended purpose" during its license term pursuant to the first prong of our renewal expectancy criteria.

16. Having discussed the matters which we shall consider in making our determination as to whether a renewal applicant deserves a renewal expectancy, it is now appropriate to discuss what matters must be included in a renewal expectancy showing. Although each licensee's station file will include evidence concerning certain engineering aspects of its service area, the construction of new cell sites during the license period and other pertinent data, we believe it necessary that each licensee involved in a comparative renewal proceeding provide a narrative exhibit justifying its entitlement to a renewal expectancy. As explained in paragraph 40, *infra*, this showing should be filed as part of the licensee's affirmative direct hearing case, if competing applications are filed against its renewal application, and should include at a minimum: (1) a description of its current service area in terms of geographic coverage and population served, as well as the system's ability to accommodate the needs of

roamers; (2) an explanation of the licensee's record of expansion, including the construction of new cell sites to meet the increase in demand for cellular radio; (3) a description of its investment in its cellular system; and (4) copies of all Commission orders finding the licensee to have violated the Communications Act or any Commission rule or policy, copies of any orders finding the licensee to be guilty of relevant non-FCC misconduct as defined by this Report and Order (see paragraph 11, *supra),* and a list of any pending proceedings that relate to any matter described above.

17. In addition to the four principal matters which must be included in the licensee's narrative describing why it is entitled to a renewal expectancy, the licensee may discuss any other matters which it thinks would assist in establishing a *primafacie* case for awarding it a renewal expectancy. Nevertheless, we have decided not to evaluate a licensee's performance during the license term based upon the degree to which it complied with the exact technical proposals of its initial application. In this regard, because our initial licensing of cellular systems involved the creation of a new, untried industry, it is understandable that proposals which initial applicants thought would work well might have required certain changes. Thus, it would be sufficient for a renewal applicant to show that its changes were justified in light of operational needs.

18. As explained in more detail in paragraph 40, *infra,* challenging applicants will have an opportunity to file petitions raising possible reasons why a renewal expectancy presumption should not be awarded prior to the actual hearing. The Commission will review such pleadings and determine whether the licensee has made a *prima facie* case for a renewal expectancy. If such a case is made and no substantial and material questions of fact have been raised requiring a hearing as to whether the licensee is due a renewal expectancy, the Commission's Hearing Designation Order (HDO) will award the licensee a rebuttable presumption that the licensee is due a renewal expectancy. Once the presumption is established, the challenging applicants will have the burden of persuasion on the issue of entitlement to the renewal expectancy. If the licensee is ultimately awarded a renewal expectancy, it will be comparatively considered with other comparative factors. As in the broadcast service, the renewal expectancy credit, if awarded, will be the most important factor in the comparative analysis.

Other Comparative Issues

19. Our Notice proposed four issues as a means of comparing incumbent licensees and challenging licensees, three of which were used in the comparative hearings held for the award of initial cellular licenses in the top thirty markets. The three issues utilized in the top thirty markets compared the following: (1) the areas and population that each applicant proposed to serve, the demand for cellular service in those areas and the applicants' ability to meet that demand; (2) the applicants' proposals for expanding system capacity to meet increased demand; and (3) the applicants' service proposals. A fourth issue was proposed to compare each applicant's past performance in the cellular industry or another business of comparable type and size. *See* paragraph 21 *infra.* As explained in our Notice, we proposed to give matters introduced under issue (3) less weight than matters considered under the other three issues. *See* paragraphs 12 and 13 of the Notice.

20. The comments on these proposed issues are diverse,[10] including at least two commenters who oppose the use of any of the first three issues listed above, because they feel that any attempt to compare a renewal applicant with the paper proposals of challengers would be inherently impossible. Most commenters expressed support for the fourth issue concerning experience. The least favored issue was issue (3), which compares aspects of each applicant's service proposal which are not compared under issues (1) and (2). In our Notice, we expressed concern about possible attempts to "goldplate" system proposals, *i.e.,* making extravagant or unrealistic proposals for which no demand has been demonstrated and which are made for the mere purpose of obtaining a comparative preference. Several commenters have made suggestions about ways of preventing or at least testing proposals which appear to constitute "goldplating." Cellular Communications, Inc. suggests that we require challenging applicants to submit documented evidence demonstrating specific demand for any services (either qualitative or quantitative) different from those previously offered by the incumbent licensee. Similarly, Cybertel Cellular Telephone Company recommends a showing of demand for any proposed services for which any advantages are claimed. For its part, Bell Atlantic Mobile Systems, Inc. asserts that no comparative preference for a challenger's service proposal should be given unless the challenger makes a showing of the technical, economic and legal feasibility of the proposal. Ameritech Mobile Communications, Inc. (Ameritech) recommends that we give no credit to a challenging applicant which proposes to replace analog technology with digital technology unless it submits a business plan showing that the challenger can operate the system economically and provide more comprehensive service than the service provided by the incumbent licensee with existing and implemented cellular technology.

21. Having considered the various arguments filed by the commenters concerning our proposed comparative issues, we believe the public interest supports adoption of the four comparative issues proposed in our Notice. *See* new Section 22.941(d) of our rules. We believe that these issues are necessary because the applicants must be compared in all significant aspects of their proposals, including their relative experience in the cellular industry or another business of comparable type and size. The issues, which are contained in the new Section 22.941(d) of our rules, are as follows:

> (1) To determine on a comparative basis the geographic areas and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;
>
> (2) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(3) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities);

(4) To determine on a comparative basis each applicant's past performance in the cellular industry or another business of comparable type and size.

As discussed in our Notice, we shall give less weight to matters concerning the service proposals of the applicants which are introduced into evidence under new Section 22.941(d)(3) of our rules than we give to evidence adduced pursuant to the other three issues delineated in Section 22.941(d) of our new rules. We believe that the foregoing recommendations concerning ways of testing service proposals which might be forms of "goldplating" have merit. Therefore, we are adding cautionary language in new Section 22.941(e) of our rules to require a challenger who claims a preference for offering any service not currently offered by the incumbent licensee to demonstrate demand for that new service and also to provide a business plan showing that the challenger can operate the system economically. Further, we shall add cautionary language to cover the situation described by Ameritech, where a challenging applicant proposes to replace analog technology with digital technology. An applicant offering such replacement of transmission technology must submit a business plan demonstrating that it can operate its system economically and provide more comprehensive service than the service provided by the incumbent licensee.

Basic Qualifications Standards for Challenging Applicants

22. Our Notice proposed that strict basic qualifications standards be imposed on applicants who file applications which are mutually exclusive with renewal applications. Basic qualifications standards are those standards which a challenging applicant must meet and substantiate in its initial application in order to be considered in a comparative renewal proceeding. If an applicant fails to meet such standards, its application would be dismissed as unacceptable for filing. These standards were proposed in order to protect the renewal process from a deluge of speculative applicants and to protect the public from inferior services provided by unqualified licensees. Specifically, we proposed imposing the financial requirements utilized in licensing the Rural Service Areas (RSAs) on challenging applicants. Thus, we proposed that an applicant filing a competing application against a cellular renewal applicant would have to demonstrate, at the time it files its application, that it has either a firm financial commitment or available financial resources sufficient to construct its proposed cellular system and operate it for one year. *See* proposed Section 22.917(g). We also requested comments on whether there are other appropriate financial requirements which would be reasonable alternatives to our proposal. In addition, we tentatively concluded that an applicant filing a competing application against an incumbent cellular licensee would not be allowed to assume that it may use the incumbent's transmitter sites. Rather, it must submit its own, independent engineering analysis. We also tentatively concluded that challenging applicants must provide with their initial applications appropriate documentation demonstrating the availability of their proposed antenna-transmitter sites. We suggested that if a challenger provided letters from the owners of its proposed antenna-transmitter sites expressing the owners' intent to sell or lease the proposed sites to the challenger, such letters would constitute appropriate documentation of site availability.

23. As explained *infra*, we have decided to impose the financial requirements utilized in licensing the Rural Service Areas (RSAs) on applicants filing competing applications against renewal applications, with certain modifications. These modifications include explicitly requiring a challenger to specify the amount of any commitment fee it has paid to obtain a "firm financial commitment" from a potential lender and allowing a challenger to establish its financial qualifications by submitting an irrevocable letter of credit or performance bond covering the amount of its estimated construction and first-year operating costs. A challenger could also establish its financial qualifications by explaining details concerning an escrow account it has established which contains sufficient cash to meet its construction and first-year operating costs. In addition, a challenger will not be allowed to assume that it may use the incumbent's antenna-transmitter sites and a challenger must provide appropriate documentation demonstrating the availability of its proposed antenna-transmitter sites.

24. Most of the commenters suggest some modifications to our proposed rules concerning the financial qualifications of challenging applicants. These suggested modifications include requiring each challenging applicant to demonstrate its ability to construct and operate its proposed station for three years, to place cash in escrow representing all or part of the applicant's total costs for the first year or for several years of operation, to present a performance bond or irrevocable letter of credit covering between one and three years of the applicant's total costs, and to give estimates for as many as nine categories of expenses for its proposed system, including documentation of each piece of equipment exceeding $100,000. After reviewing all the comments, we have decided to modify our proposed financial rules slightly to assure that each challenging applicant will be able to construct and operate its proposed system and thus assure continuity of cellular service in its proposed markets. In this regard, we find it unnecessary for any challenging applicant to demonstrate its ability to operate its proposed system beyond one year. The one year standard was used for the top thirty markets and the Metropolitan Statistical Areas (MSAs) as well as the RSAs. Although it did not appear to deter speculation in the MSAs and RSAs where lotteries decided who received construction authorizations, it appears that applicants meeting the one-year standard who have received construction authority have, for the most part, been able to obtain the financing necessary to get their cellular systems on the air. Further, because proposed Section 22.917(g) already requires applicants to list all of its "realistic and prudent estimated costs," and competing applicants are free to challenge any omissions of significant expenses during the comparative renewal proceeding by requesting the addition of a financial issue, we do not believe that competing applicants need specify an extensive list of first-year expenses, as suggested by U S WEST NewVector Group, Inc. (NewVector). In brief, imposing a firm financial commitment standard as we did in the RSAs would not appear to unreasonably exclude any

potential challenger. *See Fourth Report and Order, Amendment of the Commission's Rules for Rural Cellular Service*, 4 FCC Rcd 2542, 2545 at para.19 (1988).

25. Noting that a financial institution has not really committed resources to a project until a commitment fee (usually in the range of one fourth percent to one percent of the loan amount) has been paid by a borrower, BellSouth Corporation (BellSouth) recommends that we require competing applicants to specify the commitment fee that they have paid to potential lenders to obtain their "firm financial commitment" letters. Alternatively, BellSouth recommends that a challenger be allowed to prove its financial qualifications by submitting an irrevocable letter of credit in the amount of its estimated construction and first year operating expenses. Such a letter would have to come from the type of financial institution described in proposed Section 22.917(g). We believe that these recommendations are reasonable modifications to our proposed financial qualifications rule and that they will give additional assurance that competing applicants will be able to construct and operate their proposed systems, thus assuring continuity of service. Therefore, we are modifying our proposed financial qualifications requirements contained in proposed Section 22.917(g) to include BellSouth's foregoing suggestions. In addition, we will allow an applicant to provide a performance bond in place of an irrevocable letter of credit in the amount of its estimated construction and first-year costs, if the bond is supplied by the type of financial institution described in the proposed rule section. Moreover, because some applicants have had difficulty in the past in demonstrating that they had sufficient personal or internal resources to meet their construction and first-year expenses, as opposed to firm financial commitments, our new rule will specify that applicants can prove their financial qualifications by explaining that they have placed sufficient cash in an escrow account to meet those costs and specifying the amount of cash, the escrow account number, and the financial institution where the escrow account is located.

26. Virtually all of the commenters support our tentative conclusion that an applicant who files a competing application against an incumbent cellular licensee should not be allowed to assume that it may use the incumbent's transmitter sites, but must submit its own, independent engineering analysis in its application. As we stated in paragraph 16 of our Notice, the Commission adopted the foregoing policy in the broadcast renewal area by eliminating the so-called *Cameron* doctrine. *See* paragraph 16 of our Notice and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other participants in the Comparative Renewal Process*, 4 FCC Rcd 4780 (1989), *recon. denied*, 5 FCC Rcd 3902 (1990) (*Broadcast Renewals*). We believe that our tentative conclusion was correct and that this policy will discourage speculators and assure continuity of cellular service. Therefore, we adopt our tentative conclusion on this matter. *See* Section 22.940(b) in Appendix B.

27. Most of the commenters also endorsed our proposal that challenging applicants be required to provide appropriate documentation demonstrating the availability of their proposed antenna-transmitter sites with their initial applications. Some commenters support our initial proposal to require the submission of letters expressing the intent of the owners of the transmitter sites to sell or lease the sites to the challenging applicant. Others suggest that we require the submission of legally binding documents demonstrating the availability of those sites and also that we require applicants to demonstrate that clearances from the Federal Aviation Administration (FAA) have been obtained for each site and that there is no existing zoning or land-use planning obstacle to use of the site for the transmitting facility. In addition, several commenters request that similar documentation be provided for switching and microwave facilities.

28. After careful consideration of all the comments and reply comments on this matter, we have decided to require challenging applicants to provide appropriate documentation with their initial application which demonstrates that they either own, lease, or have reasonable assurance of the availability of each antenna-transmitter site included in their applications. If a challenger plans to buy or lease any proposed site, it must provide, at a minimum, a letter from the owner of the proposed antenna-transmitter site expressing the owner's intent to sell or lease the proposed site to the challenger. In the case of land under control of the United States Government, applicants must provide written confirmation of site availability from the appropriate Government agency. *See* Section 22.940 in Appendix B.

29. We do not believe it necessary to require challenging applicants to submit this type of documentation for switching or microwave facilities which are part of the cellular system because these facilities are usually colocated with cellular transmitters. Further, we find it impractical to require the submission of FAA clearances for each transmitter site in the challenger's initial application, because such clearances can require several months to obtain and in any case would be required only if the challenger wins the comparative hearing. We also do not believe that challenging applicants should be compelled to explain that there are no zoning or land-use planning obstacles to their antenna-transmitter sites. An application which is filed in a comparative renewal proceeding will be subject to the scrutiny of one or more competing applicants, who will file petitions to deny or to enlarge issues if they discover any local construction restrictions.

Additional Rules to Prevent Abuse of the Comparative Cellular Renewal Process

30. In order to prevent possible abuses of the comparative renewal process, we have decided to impose the restrictions on payments made to petitioners, would-be petitioners and competing applicants which we have previously adopted for comparative broadcast proceedings. Further, we are adopting a rule which provides that if a challenger obtains a cellular authorization in a comparative renewal proceeding, it cannot sell its cellular system until it has operated the cellular system for three years.

31. Our Notice proposed that we incorporate two policy revisions articulated in *Broadcast Renewals* into the cellular renewal process. In an effort to eliminate abuse of the broadcast license renewal process by applicants and petitioners who seek primarily to obtain payments from incumbent licensees, *Broadcast Renewals* banned all payments to applicants filing applications against renewal applications when those payments are made in exchange for withdrawing an application prior to the Initial Decision stage[11] of a comparative renewal proceeding; payments made after the Initial Decision stage were limited to the legitimate and prudent expenses incurred by the withdrawing applicant in preparing, filing, and prosecut-

ing its application. *Broadcast Renewals* also limited payments that can be made in exchange for withdrawing petitions to deny to the legitimate and prudent expenses of the withdrawing petitioner. Virtually all the commenters support our proposed rules which would incorporate the foregoing rule revisions into the cellular renewal process. The conduct of applicants speculating in authorizations and litigious petitioners delaying the licensing process in cellular radio are undesirable and inimical to the public interest. *See* paragraphs 14 and 15 of our Notice. Therefore, we find that the public interest would be served by adopting our proposed Sections 22.943 and 22.944, which incorporate the revisions contained in *Broadcast Renewals*. In addition, we are adopting new Section 22.945 which places limits on payments to persons who threaten to file petitions to deny and later refrain from filing those petitions in return for payments. Such payments would be limited to the legitimate and prudent expenses incurred reasonably and directly by the potential petitioner or objector in preparing to file a petition to deny. This new rule is a natural outgrowth of Section 22.944, which limits the payments made to petitioners who withdraw their petitions. Thus, without new Section 22.945, a potential petitioner would be free to threaten to file a petition to deny and thereafter agree to refrain from filing the petition in exchange for payments in excess of petition-related expenses. *See e.g., Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990) (adopting a similar rule for broadcast proceedings). By adopting these rules, we intend to discourage speculation and frivolous litigation which constitute blatant abuses of our licensing processes.

32. In our Notice, we solicited comments as to whether a proposal by Centel Cellular Company (Centel) should be adopted as a means of discouraging speculative parties from filing applications against cellular renewal applicants. Centel proposed that, in order to prevent abuse of the comparative cellular renewal process by speculative applicants who wish to obtain a cellular authorization for the purpose of selling it for a high price, the Commission should prohibit the sale of a cellular authorization awarded to an applicant in a comparative renewal proceeding prior to construction of the system (if construction is necessary) and operation of that system by the new licensee for a period of at least three years. Centel's proposal received nearly universal support from the commenters in this proceeding.[12] GTE Mobilnet Incorporated (GTE) recommended that the Commission allow certain exceptions to the three-year prohibition, including situations where (1) a cellular system is to be transferred as part of a bona fide sale of an on-going business to which the cellular operation is incidental; (2) a transfer of control of a cellular system is required because of the death of the licensee; and (3) a transfer of control of a cellular system is *pro forma* and does not involve a change of ownership.

33. Despite our efforts at reducing speculation in cellular radio applications, which were outlined in paragraphs 14 and 15 of our Notice, over 288,000 applications were filed with the Commission for the 428 RSAs. In *Bill Welch*, 3 FCC Rcd 6502 (1988), the Commission permitted the sale of authorizations for unbuilt facilities to provide flexibility to licensees to transfer their authorizations where it was not economically wise or reasonable to build the system as originally proposed. Our goal in *Welch* was to ensure that initial cellular systems were built and made available to the public. The situation in a comparative renewal proceeding is quite different. In every instance, if a challenging applicant wins, it will be replacing a functioning cellular system. Therefore, we wish to insure that applicants challenging licensees are sincerely interested in providing service on a continuous basis as opposed to making a quick turnover profit. In order to prevent a challenger who wins such a proceeding from hiring a specialized contractor to construct the system and then selling the system soon after it is constructed at a huge profit, we believe it necessary to require the new licensee to operate the system for at least three years before it can be sold. We have determined that the public interest will be served by adopting Centel's proposal and that the three-year holding period will not be unreasonably burdensome for serious challengers. We are also adopting the special exceptions to the three-year holding period requested by GTE because those exceptions do not involve situations in which the cellular licensee is attempting to make a quick profit. *See* Section 22.40(b) in Appendix B.

Hearing Alternatives

34. Our Notice proposed to utilize "paper" hearings of the general type outlined in Section 22.916 of our current rules. The Presiding Judge would rely on written evidence for the most part, and the entire proceeding would be conducted on an expedited basis. Our Notice also requested comments on an alternative, bifurcated hearing procedure, which we proposed as a method of streamlining comparative renewal proceedings. The first step under this procedure would be to determine initially whether a renewal expectancy should be granted. If the Commission determined that the renewal applicant should be granted a renewal expectancy, the renewal application would be granted. If an applicant were not entitled to a renewal expectancy, the Commission could then compare the applicants pursuant to the evaluation criteria described in this Report and Order.[13]

35. After careful review of the relevant comments and case law, it appears that the bifurcated hearing procedure could run afoul of the provisions of Section 309 of the Act, as interpreted by the courts. *See Citizens Communications Center v. FCC* 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972) (*Citizens)*. In light of *Citizens*, we have decided, for policy reasons, not to create any unnecessary uncertainty to the renewal process by utilizing our proposed bifurcated procedure.

36. Several commenters who support our proposed bifurcated procedure rely on *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989) (*Hispanic)*. In *Hispanic*, the court affirmed our authority to grant applications in the Instructional Television Fixed Service (ITFS) to local applicants without considering mutually exclusive applications by parties who were not local but were otherwise qualified. Thus, in *Hispanic*, a non-local ITFS applicant was viewed as ineligible for the ITFS frequency sought, if a local applicant also applied for the same frequency. *Hispanic* did not involve a comparative renewal situation. Although CTIA is correct in stating that *Hispanic* stands for the general proposition that the Act does not preclude the FCC from establishing threshold standards to identify qualified applicants and excluding those applicants who plainly fail to meet those standards, *Hispanic* does not appear to over-

rule *Citizens*, or allow the Commission to grant an absolute preference to renewal applicants who deserve a renewal expectancy, and deny timely-filed challenging applicants their right to a hearing guaranteed by *Citizens*.[14]

Hearing Procedures

37. While we have decided not to implement our proposed bifurcated procedure, we have decided to adopt procedures which will streamline any comparative cellular renewal proceedings and will also allow the Commission to decide whether a renewal applicant deserves a rebuttable presumption that it is entitled to a renewal expectancy prior to designating applications for a comparative renewal proceeding. Paragraph 22 of our Notice sought comments on our proposed "paper" hearing procedures, and paragraph 11 of our Notice asked for comments on whether a cellular licensee who presents evidence sufficient to satisfy its burden of demonstrating entitlement to a renewal expectancy should receive a rebuttable presumption that it deserves a renewal expectancy. The Notice also explained that, once such a presumption is established, the competing applicants would have the burden of persuasion on the issue of entitlement to the renewal expectancy credit. The Notice solicited comments on this proposal and on the issues of what evidence would prove entitlement to such a presumption and whether the use of such a presumption would expedite or simplify any renewal hearings.

38. In its Comments, NewVector explains that, under our current processing rules, about 120 days would pass between the initial filing of a cellular renewal application and the end of the petitioning period for challenging applications, assuming that all applications are placed on public notice within two weeks of receipt. The 120 day timetable includes the following: two weeks for initial processing of the renewal application and placing it on public notice; 30 days to file petitions to deny the renewal application after public notice is given;[15] 60 days to file competing applications after issuance of the foregoing public notice;[16] two weeks to place competing applications on public notice; and 30 days to file petitions against those competing applications. Thus, without rule revisions or changes, challengers would have 60 days to file competing applications against renewal applicants. NewVector suggests that the current structure provides a substantial incentive for challengers to engage in "one-upmanship," which can be defined as the art of proposing to provide more services or facilities than one's opponent for the purpose of winning a comparative hearing.

39. NewVector recommends that the Commission adopt rules allowing a shorter filing procedure to reduce potential challengers' temptation to engage in "one-upmanship," to reduce the "dead time" outlined above from 120 days to 75 days, and to increase the overall fairness of the proceeding. Several commenters have endorsed the general idea of a shorter filing period for applicants involved in comparative renewal proceedings. NewVector suggests that both renewal applicants and challenging applicants be given one specific week to file their applications. NewVector recommends that challengers be required to tender only Schedule A of their Form 401 and the filing fee in that period. NewVector proposes that both renewal and challenging applicants be given 30 days after the issuance of a Public Notice announcing the filing of their applications to file supplements and major amendments to the foregoing applications. Thus, incumbents would be allowed to file their renewal expectancy showings and challengers could file their Schedule Bs to their applications. NewVector's proposed procedure would allow interested parties to file petitions to deny against all of the applications within 60 days of the referenced Public Notice. Other commenters have recommended that the Commission rule on whether a renewal applicant deserves a renewal expectancy prior to designating any applications for a comparative renewal hearing.

40. We have decided to incorporate many of the foregoing ideas into procedures which are similar to the procedures we utilized in hearings for the top 30 markets. Thus, we shall require both renewal applicants and competing applicants to file their applications during the period extending between thirty (30) and sixty (60) days prior to the expiration date of the relevant cellular license.[17] This change in our rules will streamline the comparative renewal process. *See* Section 22.31(i) in Appendix B. Further, we will require all challenging applicants to file five copies of their affirmative direct hearing case exhibits with their applications. Exhibits should be numbered and include the sponsoring witness affidavit. This streamlining procedure is drawn from our prior experience in the top 30 markets. *See Cellular Communications Systems*, 89 FCC 2d 58, 91 (1982). Within thirty (30) days of the issuance of the Public Notice announcing the filing of applications competing with a renewal application, the renewal applicant will be required to file five copies of its complete affirmative direct case, including its showing demonstrating its entitlement to a renewal expectancy. Interested parties will be allowed thirty (30) days after the renewal applicant has filed its direct case to file petitions to deny against any of the applications and the applicants will be allowed fifteen (15) days to file replies to those petitions; no further pleadings will be allowed. All applicants will be required to file their rebuttal cases within thirty (30) days after the order designating the applicants for hearing is published in the Federal Register. The other hearing procedures will follow the procedures delineated in Sections 22.916(b)(5) through (b)(8) of our rules. *See* Section 22.942 in Appendix B.

41. We believe that the foregoing procedures will expedite the conduct of any comparative cellular renewal proceedings which might occur, while assuring fairness to the various parties involved in such proceedings. In this regard, the procedures will allow the Commission to determine whether a renewal applicant deserves a rebuttable presumption that it is entitled to a renewal expectancy based upon the licensee's pre-hearing showing. If there are no substantial and material questions of fact requiring a hearing concerning the licensee's entitlement to a renewal expectancy and if the renewal expectancy showing meets the standards set forth in this Report and Order, the Commission will award a rebuttable presumption that the licensee is entitled to a renewal expectancy at the time it issues an order designating the licensee and competing applicants for a comparative hearing. If serious questions of fact concerning the licensee's renewal expectancy are raised, the designation order will include appropriate hearing issues. Whether or not a rebuttable presumption is awarded, the designation order will include an appropriate hearing issue regarding the incumbent's entitlement to a renewal expectancy. The award of the foregoing rebuttable presumption will not run afoul of the prohibitions articulated in *Citizens*. In *Citizens*, the court objected

to a system by which no comparative hearing would be conducted if the Commission found that the licensee had furnished program service which was substantially attuned to meeting the needs and interests of its service area without any serious deficiencies. Our procedures will allow the Commission to grant a rebuttable presumption that a licensee is entitled to a renewal expectancy, but there will also be a comparative hearing that includes the renewal expectancy issue.

42. NewVector asserts that many renewal applicants may, at the time of filing their renewal applications, already have other applications on file for system enhancements or modifications. NewVector explains that these applications will, in many cases, be granted and the systems constructed long before the comparative hearing is concluded.[18] In this light, NewVector argues that a renewal applicant should be permitted to seek credit for pending system modifications by including reference to such applications in its renewal application. We agree. Therefore, we shall add language to new Section 22.941(b) to explain that an applicant may seek credit for pending system modification applications in making its showing of entitlement to a renewal expectancy.[19]

III. CONCLUSION

43. We have determined that we need to create a renewal expectancy for cellular licensees who have met certain criteria in serving the public during their past license terms. We have adopted criteria for earning a renewal expectancy and outlined the basic showing required to demonstrate a licensee's compliance with those criteria. We have also determined other comparative issues for a comparative cellular renewal proceeding and have established basic qualifications standards for competing applications filed against renewal applications. In addition, we have adopted rules whose purpose is to prevent abuses of the comparative cellular renewal process. Lastly, we have adopted filing and hearing procedures which will both expedite comparative cellular renewal proceedings and be fair to all parties concerned. The Final Regulatory Flexibility Analysis is contained in Appendix C to this Report and Order.

IV. ORDERING CLAUSES

44. Authority for the rule changes adopted herein is contained in Sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

45. Accordingly, IT IS ORDERED that Part 22 of the Commission's rules IS HEREBY AMENDED as discussed herein and as shown in Appendix B below.

46. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

47. IT IS FURTHER ORDERED that this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Cellular radio licenses are granted for a period of ten years. The first license, issued to the wireline operator in the Chicago, Illinois Metropolitan Statistical Area (MSA), will expire on October 1, 1993.

[2] Appendix A lists the parties filing Comments and Reply Comments herein.

[3] Appendix B contains the new and revised rules which we are adopting in this proceeding.

[4] McCaw's Reply Comments at 12-13.

[5] *Id.*

[6] *Character Policy Statement II* explains that the Commission retains the discretion "to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions." 5 FCC Rcd 3252 n.3 (1990).

[7] NCRA's Comments at 17.

[8] In recent permissible ex parte presentations, NCRA has made general allegations that cellular carriers have engaged in practices which violate various Commission rules and policies, including the existing resale requirement. We do not believe this to be the appropriate forum to deal with these allegations. NCRA should seek relief by either filing a complaint pursuant to Section 208 of the Act or requesting a declaratory ruling that certain practices are forbidden by our rules and policies. We also wish to make clear that a carrier's substantial compliance with the Commission's resale requirement is among the Commission's rules and regulations falling within the second prong of our renewal expectancy test.

[9] *See Bundling of Cellular Customer Premises Equipment and Cellular Service*, 6 FCC Rcd 1733 (1991).

[10] At pages 8-9 of its Reply Comments, LIN Broadcasting Corporation (LIN), proposes several comparative issues which it desires to utilize in place of the Notice's four proposed issues. We find LIN's proposed issues too general and subjective for purposes of comparative renewal proceedings. For example, one proposed issue asks: "Which of the applicants is most likely to be capable of introducing and developing innovations that would enhance service to cellular users?" This issue is too general and speculative in nature and requires a subjective conclusion. In addition, LIN's proposed issues do not elicit enough specific objective evidence. Thus, one issue asks: "Which applicant has the resources (including personnel and financial resources) and expertise (technical and otherwise), and has done the necessary planning to provide the most appropriate service to the public?" This issue doesn't suggest what constitutes the "most appropriate service to the public."

[11] An Initial Decision, which includes findings of fact and conclusions of law, is issued by an Administrative Law Judge.

[12] The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) argues that the Commission need prohibit the sale of a cellular system obtained by a challenger for a period of only one year. OPASTCO claims that a three-year restriction would "unnecessarily lock a cellular system operator into a situation that could harm its financial

well-being, and perhaps its survival." As explained, *infra*, we believe that a three-year prohibition on transfers is appropriate. The purpose of our three-year prohibition is to provide stability and continuity of service to the public in the cellular radio industry, as explained in paragraph 33, *infra*. We do not wish to encourage "caretaker" licensees to operate cellular systems for a year and then sell them. Of course, if truly egregious, unpredictable situations develop, a new cellular operator could always seek waiver of our transfer prohibition.

[13] The Notice also suggested that if a renewal application were denied in conjunction with the preliminary renewal expectancy proceeding, the Commission might utilize a random selection process to determine which of the challenging applicants should be granted. After considering the comments and the relevant case law, it does not appear that we could utilize a random selection process unless the renewal applicant decided to dismiss its application. In most instances, the renewal applicant would be entitled to an evidentiary hearing on the question of whether or not it was entitled to have its license renewed. Further, as several parties explained, if the second step of the foregoing two-step procedure involved a lottery among the renewal application and competing applications, it would be illegal. *See* Section 309(i)(1) of the Act, which states that lotteries may be used only in the case of an application "for an initial license or construction permit." Thus, a lottery could not be used to determine whether a renewal application should be granted.

[14] Similarly, *California Public Utilities Commission v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (*FERC*), does not appear to overrule *Citizens* and allow us to implement our proposed bifurcated procedure.

[15] *See* Section 22.30(a)(4).

[16] *See* Section 22.31(b)(2).

[17] Section 22.11(b) of our rules currently provides that cellular radio licensees must file their renewal applications within this period of time. New Section 22.31(i) of the rules, which we adopt today, gives challengers the same period for filing their competing applications. In this regard, we note that we shall accept applications by licensees and challengers which are filed on the thirtieth or sixtieth day prior to the relevant expiration date of a cellular license, as well as applications filed between the thirtieth and sixtieth day prior to the relevant license expiration date.

[18] Section 307 of the Communications Act allows an existing license to stay in effect pending any hearing and final decision on a renewal application for that license.

[19] NewVector also suggests that renewal applicants be allowed to file a "system modification" application proposing any long-term changes the licensee wants to make to its existing system and include this application as a supplement to its renewal application. NewVector requests that the modification application be consolidated for hearing with the renewal proceeding. NewVector suggests that such an application would include a licensee's plans with respect to the implementation of digital cellular. We must reject this request because it is completely contrary to the "competitive spur" theory of renewal, which holds that a licensee should be encouraged by the renewal process to provide the best possible service to its customers during its license term. Thus, a licensee needs to create a good record of past performance to overcome any potential competitors at renewal time.

APPENDIX A

LIST OF COMMENTERS

1. Ameritech Mobile Communications, Inc.
2. Associated Communications Corporation
3. Bell Atlantic Mobile Systems, Inc.
4. BellSouth Corporation
5. Cellular Communications, Inc.
6. Cellular Telecommunications Industry Association
7. Centel Cellular Company
8. Century Communications Corporation
9. Contel Cellular, Inc.
10. Cybertel Cellular Telephone Company
11. GTE Mobilnet Incorporated
12. Gurman, Kurtis, Blask & Freedman, Chartered
13. LIN Broadcasting Corporation
14. McCaw Cellular Communications, Inc.
15. MCI Telecommunications Corporation
16. Metro Mobile CTS, Inc.
17. National Cellular Resellers Association
18. National Telephone Company Association
19. NYNEX Mobile Communications Company
20. PacTel Cellular
21. Rochester Telephone Mobile Communications
22. Southwestern Bell Mobile Systems, Inc.
23. Telocator
24. Telephone and Data Systems, Inc.
25. United States Cellular Corporation
26. United States Telephone Association
27. U S WEST NewVector Group, Inc.
28. Vanguard Cellular Systems, Inc.

LIST OF REPLY COMMENTERS

1. Ameritech Mobile Communications, Inc.
2. Bell Atlantic Mobile Systems, Inc.
3. Cellular Telecommunications Industry Association
4. Centel Cellular Company
5. Cybertel Cellular Telephone Company
6. Gurman, Kurtis, Blask & Freedman, Chartered
7. LIN Broadcasting Corporation
8. McCaw Cellular Communications
9. MCI Telecommunications Corporation
10. National Cellular Resellers Association
11. NYNEX Mobile Communications Company
12. Organization for the Protection and Advancement of Small Telephone Companies

13. PacTel Cellular
14. Puerto Rico Telephone Company
15. Rochester Telephone Mobile Communications
16. Southwestern Bell Mobile Systems, Inc.
17. Telocator
18. United States Telephone Association
19. Vanguard Cellular Systems, Inc.

APPENDIX B

Final Rules

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.28 is amended by revising paragraph (a) and the introductory text of paragraph (b) to read as follows:

Section 22.28 Dismissal and return of applications.

(a) Except as provided under Sections 22.29 and 22.943 (Dismissal of applications in renewal proceedings), any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of Section 22.29 as appropriate.

(b) Subject to the provisions of Section 22.943 (Dismissal of applications in renewal proceedings), a request to dismiss an application without prejudice will be considered after designation for hearing only if:

* * * * *

3. Section 22.29 is amended by revising the introductory portion of paragraph (a) to read as follows:

Section 22.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of Section 22.943 (Dismissal of applications in renewal proceedings), Section 22.944 (Dismissal of petitions to deny in renewal proceedings), and Section 22.945 (Threats to file petitions to deny or informal objections in renewal proceedings), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

* * * * *

4. Section 22.31 is amended by adding new paragraph (j) to read as follows:

Section 22.31 Mutually exclusive applications.

* * * * *

(j) Notwithstanding other provisions of this section, an application shall be entitled to comparative consideration with a cellular renewal application only if it is filed within the period specified in Section 22.11(b) for the filing of cellular renewal applications and clearly indicates the call sign and frequency block of such renewal applicant.

5. Section 22.32 is amended by revising paragraph (e) (5) and adding new paragraph (e) (6) to read as follows:

Section 22.32 Consideration of applications.

* * * * *

(e) * * *

(e)(5) Except as provided under paragraph (e)(6) of this section and Section 22.942 (Procedures for comparative renewal proceedings), in the Domestic Public Cellular Radio Telecommunications Service the application is entitled to comparative consideration (pursuant to Section 22.31) with another application (or applications); in such cases the hearing shall conform to the comparative evaluation procedure described in Section 22.916.

(e)(6) In the Domestic Public Cellular Radio Telecommunications Service, the application is entitled to comparative consideration (pursuant to Section 22.31) with another application (or applications) in a comparative renewal proceeding; in such cases, the hearing shall conform to the comparative evaluation procedure described in Section 22.942.

* * * * *

6. Section 22.40 is amended by revising paragraph (b) to read as follows:

Section 22.40 Considerations involving transfer or assignment applications.

* * * * *

(b) *Cellular systems.*

(1) Except in cases where paragraph (2) of this section applies, the sale of a cellular construction permit will only be permitted after a showing that the transferor is not speculating in cellular licenses. The burden of proof is on the transferor. *See* also Section 22.920.

(2) In situations where the first construction authorization or first license for a particular cellular system was awarded as the result of a comparative renewal proceeding, an assignment or transfer of control application will not be entertained for that cellular system for a period of three years from the date that service was initiated except if:

(i) The cellular system is to be transferred as part of a bona fide sale of an on-going business to which the cellular operation is incidental;

(ii) The transfer of control of a cellular system is required because of the death of the licensee; or

(iii) The transfer of control of a cellular system is *pro forma* and does not involve a change of ownership.

* * * * *

7. Section 22.917 is amended by adding new paragraph (g) to read as follows:

Section 22.917 Demonstration of financial qualifications.

* * * * *

(g) *Comparative Renewal Proceedings.* An applicant filing a competing application against the renewal application of an incumbent cellular licensee shall demonstrate, at the time it files its application, that it has either

(1) a firm financial commitment, an irrevocable letter of credit or performance bond in the amount of its realistic and prudent estimated costs of construction and any other expenses to be incurred during the first year of operating its proposed system [the irrevocable letter of credit or performance bond must be from the type of financial institution described in paragraph (4) of this section]or

(2) available resources, as defined in paragraph (5) of this section 22.917(g)(2), necessary to construct and operate its proposed cellular system for one year.

(3) The firm financial commitment may be contingent on the applicant obtaining a construction permit. The applicant must also list all of its realistic and prudent estimated costs of construction and any other expenses to be incurred during the first year of operating its proposed system.

(4) The firm financial commitment required above shall be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier; shall specify the terms of the loan or other form of credit arrangement, including the amount to be borrowed, the interest to be paid, the amount of the commitment fee and the fact that it has been paid, the terms of repayment and any collateral required; and shall contain a statement:

(i) That the lender has examined the financial condition of the applicant including audited financial statements where applicable, and has determined that the applicant is creditworthy;

(ii) That the lender has examined the financial viability of the proposal for which the applicant intends to use the commitment;

(iii) That the lender is committed to providing a sum certain to the particular applicant;

(iv) That the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and

(v) That the commitment is not in any way guaranteed by an entity other than the applicant.

(5) Applicants intending to rely on personal or internal resources must submit--

(i) Audited financial statements certified within one year of the date of the cellular application, indicating the availability of sufficient net current assets to construct and operate the proposed cellular system for one year;

(ii) A balance sheet current within 60 days of the date of filing its application that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed cellular system for one year; and

(iii) A certification by the applicant or an officer of the applicant organization attesting to the validity of the unaudited balance sheet.

(6) Applicants intending to rely upon financing obtained through a parent corporation must submit the information required by paragraph (5) of this section, 22.917(g)(2)(i) through (iii), as the information pertains to the parent corporation.

(7) As an alternative to relying upon a firm financial commitment, an irrevocable letter of credit, or a performance bond from a financial institution as described in paragraph (4) of this section, an applicant may state that it has placed in an escrow account sufficient cash to meet its construction and first-year operating expenses. Such a statement must specify the amount of cash, the escrow account number, and the financial institution where the escrow account is located.

(8) A competing application filed against the renewal application of an incumbent cellular licensee which does not demonstrate, at the time it is initially filed, that the competing applicant has sufficient funds to construct and operate for one year its proposed cellular system shall be dismissed as unacceptable for filing.

8. Section 22.940 is added to 47 C.F.R. Part 22 to read as follows:

Section 22.940 Basic qualifications standards for applicants filing competing applications against cellular renewal applications.

(a) In addition to the other requirements set forth in Part 22 for applications for initial cellular systems, an applicant filing a competing application against a cellular renewal application must provide, at the time it files its initial application, appropriate documentation demonstrating that its proposed antenna-transmitter site(s) will be available. Competing applications which do not include such documentation will be dismissed as unacceptable for filing. If the competing applicant does not own a particular site, it must, at a minimum, demonstrate that the site is available to him by providing a letter from the owner of the proposed antenna-transmitter site expressing the owner's intent to sell or lease the proposed site to the applicant. If any proposed antenna-transmitter site is under U. S. Government control, the applicant must submit written confirmation of the site's availability from the appropriate Government agency.

(b) Applicants which file competing applications against incumbent cellular licensees may not assume that an incumbent licensee's transmitter sites are available for their use.

9. Section 22.941 is added to 47 C.F.R. Part 22 to read as follows:

Section 22.941 Criteria for comparative cellular renewal proceedings.

(a) A cellular renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant license period demonstrates that the renewal applicant:

(1) Has substantially used its spectrum for its intended purpose;

(2) Has substantially complied with applicable Commission rules, policies and the Communications Act; and

(3) Has not otherwise engaged in substantial relevant misconduct.

(b) In order to establish its right to a renewal expectancy, a cellular renewal applicant involved in a comparative renewal proceeding must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing shall include the following:

(1) A description of its current service area in terms of geographic coverage and population served, as well as the system's ability to accommodate the needs of roamers;

(2) An explanation of its record of expansion, including a timetable of the construction of new cell sites to meet changes in demand for cellular radio service;

(3) A description of its investments in its cellular system; and

(4) Copies of all Commission orders finding the licensee to have violated the Communications Act or any Commission rule or policy; copies of any orders finding the licensee to be guilty of relevant non-FCC misconduct, including misconduct constituting a felony, fraudulent misrepresentations to governmental units, criminal misconduct involving false statements or dishonesty, or antitrust or anticompetitive violations involving communications services; and a list of any pending proceedings that relate to any matter described above.

(c) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications which were pending on the date it filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.

(d) The following additional comparative issues will be included in comparative renewal proceedings:

(1) To determine on a comparative basis the geographic areas and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(2) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(3) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities);

(4) To determine on a comparative basis each applicant's past performance in the cellular industry or another business of comparable type and size.

(e) With respect to evidence introduced pursuant to Section 22.941(d)(3) of this section, an applicant filing a competing application against a cellular radio renewal applicant (competing applicant) who claims a preference for offering any service not currently offered by the incumbent licensee must demonstrate demand for that new service and also present a business plan showing that the competing applicant can operate the system economically. A competing applicant who proposes to replace analog technology with digital technology will receive no credit for its proposal unless it submits a business plan showing how it will operate its system economically and how it will provide more comprehensive service than does the incumbent licensee with existing and implemented cellular technology.

(f) The ultimate issue in comparative renewal proceedings will be: to determine, in light of the evidence adduced in this proceeding, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

10. Section 22.942 is added to 47 C.F.R. Part 22 to read as follows:

Section 22.942 Procedures for comparative renewal proceedings.

The following expedited hearing procedures shall apply to comparative renewal proceedings in the Domestic Public Cellular Radio Telecommunications service:

(a) An applicant for construction authority who files an application which is mutually exclusive with an application for renewal of a cellular radio system license must file its affirmative direct case, including all documentary evidence upon which the applicant intends to rely in a comparative context, with its initial application. Each exhibit should be numbered and include the sponsoring witness affidavit. An original and four copies of the direct case must be filed: an original and two copies for the Mobile Services Division, Common Carrier Bureau and two copies for the Office of Administrative Law Judges. The burden will be on each applicant to obtain copies of its mutually exclusive opponent's exhibits in a timely manner, either from the opponents or by duplicating the Commission's copies. We expect all parties to cooperate in making available materials to each other upon request.

(b) Within thirty (30) days of the issuance of the Public Notice announcing the filing of a renewal application and applications competing with that renewal application, the renewal applicant must file its complete affirmative direct case, including its showing demonstrating any entitlement to a renewal expectancy. Four copies of the direct case must be filed with the Commission and a copy served on each other party to the proceeding.

(c) Interested parties have thirty (30) days from the date that the renewal applicant submits its direct case to submit petitions to deny that application. Applicants have fifteen (15) days to file replies; no further pleadings will be accepted.

(d) If, prior to a comparative renewal hearing, it appears that a renewal applicant's showing concerning its entitlement to a renewal expectancy meets the standards set forth in Section 22.941(a) of the rules, the Commission will award a rebuttable presumption that the licensee

is entitled to a renewal expectancy in its order designating the licensee and any competing applicants for a comparative hearing. If such a presumption is awarded, the applicants competing with the renewal applicant will have the burden of persuasion on the issue of the licensee's entitlement to a renewal expectancy in the comparative hearing.

(e) Parties have ten days after publication in the Federal Register of the hearing designation order to file notices of appearance.

(f) Rebuttal cases must be filed within thirty (30) days of the date of publication in the Federal Register of the order designating the applications for hearing. Four copies of the rebuttal case must be filed with the Commission and a copy served on each other party to the proceeding.

(g) The expedited hearing procedures delineated in Sections 22.916(b)(5) through (b)(8) of our rules shall be utilized in comparative cellular radio renewal proceedings.

11. Section 22.943 is added to 47 C.F.R. Part 22 to read as follows:

22.943 Dismissal of applications in renewal proceedings.

(a) Any applicant for construction authority, that has filed an application that is mutually exclusive with an application for the renewal of a license of a cellular radio system (hereinafter "competing applicant") and seeks to dismiss or withdraw its application and thereby remove a conflict between applications pending before the Commission, must obtain the approval of the Commission.

(b) If a competing applicant seeks to dismiss or withdraw its application prior to the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application:

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

(4) In addition, within 5 days of the filing date of the applicant's request for approval, each remaining competing applicant and the renewal applicant must submit an affidavit setting forth:

(i) A certification that neither the applicant nor its principals has paid or will pay any money or other consideration in exchange for the dismissal of its application; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(c) If a competing applicant seeks to dismiss or withdraw its application after the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(2) The exact nature and amount of any consideration paid or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement;

(4) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application and;

(5) The terms of any oral agreement relating to the dismissal or withdrawal of its application;

(6) In addition, within 5 days of the filing date of the applicant's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth;

(i) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(d) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) An application shall be deemed to be pending before the Commission from the time an application is filed with Commission until an order of the Commission granting, denying, or dismissing the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, and prosecuting its application.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

12. Section 22.944 is added to 47 C.F.R. Part 22 to read as follows:

Section 22.944 Dismissal of petitions to deny in renewal proceedings.

(a) Whenever a petition to deny has been filed against any application for the renewal of a license for a cellular radio system or against an application for construction authority that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny, either unilaterally or in exchange for financial consideration, the petitioner must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny.

(5) In addition, within 5 days of the filing date of the petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth;

(i) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the petition to deny; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny.

(b) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition shall be deemed to be pending before the Commission from the time a petition is filed with Commission until an order of the Commission granting, denying, or dismissing the petition is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, and prosecuting its petition for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

13. Section 22.945 is added to 47 C.F.R. Part 22 to read as follows:

Section 22.945 Threats to file petitions to deny or informal objections in renewal proceedings.

(a) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or an informal objection against any application for the renewal of a license for a cellular radio system or against an application for construction authority that is mutually exclusive with a renewal application. For the purposes of this section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector incurred reasonably and directly in preparing to file a petition to deny will not be considered to be payment for refraining from filing a petition to deny or informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement nonfinancial promises are prohibited unless specifically approved by the Commission.

(b) Whenever any payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection, the applicant must file with the Commission a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) Certification that neither the would-be petitioner, nor any person or organization related to the would-be petitioner, has received or will receive any money or other consideration in connection with the agreement other than legitimate and prudent expenses reasonably incurred in preparing to file the petition to deny;

(2) The terms of any oral agreement;

(c) For purposes of this section :

(1) Affidavits filed pursuant to this section shall be executed by the applicant, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) "Legitimate and prudent expenses" are those expenses reasonably incurred by a would-be petitioner in preparing to file its petition for which reimbursement is being sought.

(3) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and purpose of this action:

This *Report and Order* establishes standards for conducting comparative renewal hearing proceedings in the Domestic Public Cellular Radio Telecommunications Service (cellular radio service). The new rules adopted in this proceeding further our objective of providing effective and adaptive regulation for communications.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

Several commenters suggested modifications to some of the Commission's proposals. As a result, we have made some modifications to those proposals.

III. Significant alternatives considered:

The *Notice of Proposed Rule Making* in this proceeding offered many proposals. The commenters supported the basic thrust of this proceeding, including most of the proposals. Several commenters suggested modifications to some of the Commission's proposals. One of our proposals was to utilize a two-step hearing procedure which would require the Commission to determine initially whether a renewal applicant's past record of performance justified granting it a major preference known as a renewal expectancy. If the Commission granted such a renewal expectancy, the renewal applicant's application would be granted and no hearing would be conducted. If

the licensee's record did not justify renewal without hearing, its application would be designated for hearing with competing applications. After careful analysis, the Commission determined that such a two-step procedure was illegal under current case law. Nevertheless, the Commission explained that it would review a renewal applicant's application prior to hearing to determine whether the applicant had presented sufficient evidence to justify giving it a rebuttable presumption that it deserved a renewal expectancy. If such a presumption were granted, the burden of persuasion on the issue of entitlement to a renewal expectancy would switch to the challenging applicants.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Part 22 Rulemaking on Cellular Radio Comparative Renewal Proceedings

I support this Report and Order which establishes comparative hearing criteria for cellular renewal applicants and any challengers. In evaluating this docket, I established several overall policy objectives: (1) Encourage ongoing investment and efficient use of the spectrum by present cellular licensees; (2) Require specific criteria for renewal and challenger applications that will minimize speculation and encourage comparative hearings between bona fide parties; and (3) Provide sufficient flexibility in the application process for bona fide challengers [i.e. new entrants] with comparable business experience to file applications challenging the license renewal.

I believe this item achieves the proper balance in its formulation of comparative renewal standards. In particular, I support the adoption of the comparative renewal expectancy for those incumbent operators whose performance merits such recognition. I also support the strict enforcement of basic eligibility criteria for challenging applicants. In this regard, I believe the Order adopts the proper financial, construction period and operational requirements. At the same time, I also am pleased to see that a challenger will be allowed to establish part of its bona fide based on past performance in another business of comparable type and size. I believe this flexibility is warranted. I look forward to receiving feedback from interested parties on the effectiveness of the rules adopted in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Applications of

AMSC SUBSIDIARY CORPORATION	File Nos. 15/16-DSSMP-91
CONSTELLATION COMMUNICATIONS, INC.	File Nos. 17-DSS-P-91(48) CSS-91-013
ELLIPSAT CORPORATION	File No. 18-DSS-P-91(18)
LORAL QUALCOMM SATELLITE SERVICES, INC.	File Nos. 19-DSS-P-91(48) CSS-91-104
TRW, INC.	File Nos. 20-DSS-P-91(12) CSS-91-015

For Authority to Construct RDSS and
Mobile Satellite Systems for Operation
in the RDSS Bands

ORDER

Adopted: January 10, 1992; Released: January 15, 1992

By the Chief, Domestic Facilities Division:

1. Loral Qualcomm Satellite Services, Inc. (Loral) has filed a Petition for Extension of Time in which to file replies and responses in the proceedings referenced above. The proceedings concern applications proposing satellite systems that would provide a variety of voice mobile satellite services in the frequency bands currently allocated to the radiodetermination satellite service, *i.e.*, 1610-1626.5 MHz/2483.5-2500 MHz. They were filed in response to a cut-off notice inviting applications to be considered concurrently with applications that previously had been filed by Ellipsat Corporation and Motorola Satellite Communications, Inc. (Motorola). *See* Public Notice, Report No. DS-1068 (April 1, 1991). The new applications were placed on public notice and a pleading cycle was established. *See* Public Notice, Report No. DS-1134 (October 24, 1991). Comments and petitions were filed on December 18, 1991.

2. In its petition, Loral requests that the date for reply comments and oppositions to petitions to deny be extended from January 17 to January 31, 1992 and that the date for responses be extended from February 7, 1992 to March 13, 1992. Loral represents that Constellation Communications, Inc. and TRW, Inc. do not object to an extension of time. Ellipsat has filed comments in support of the requested extension. Motorola has filed an Opposition to Loral's Petition.

3. Citing the complex and extensive technical appendices and arguments contained in the December pleadings, as well as end-of-year staff shortages, Loral states that an extension of time to file replies and responses will serve the public interest. Loral asserts that by allowing more time to analyze the submissions, the record will contain a complete analysis of all the technical filings. In addition, Loral states that the proposed comment schedule would enable the applicants to prepare for WARC-92 as well as allow for consideration of the conference results in the final round of pleadings.

4. In its Opposition, Motorola states it does not consider the number of pleadings filed in December to be "extensive." Motorola further states that the issues raised in the petitions are similar to those filed with respect to other applicants' systems and related petitions for rulemaking and some of these issues have already been commented on in other proceedings. In addition, Motorola suggests that a March 13, 1992 due date for responses provides only two weeks after the scheduled close of WARC-92 and that this is not enough time to digest the January submissions and the results of the conference and present coherent responses.

5. The public interest would be served by allowing additional time to analyze the complex technical issues presented in this proceeding in light of the results of WARC-92. While Motorola contends that pleadings due two weeks from the end of WARC-92 would not allow adequate time to analyze the results of the conference, the other parties apparently believe that two weeks is sufficient.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Loral Qualcomm Satellite Services, Inc.'s Petition for an Extension of Time IS GRANTED. The date for filing replies and oppositions to Petitions to Deny is extended from **January 17, 1992** to **January 31, 1992.** The date for filing responses is extended from **February 7, 1992** to **March 13, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CANTON 67, LTD., DEBTOR-IN-POSSESSION — BALCT-901002KN

and

MORTON J. KENT, INDIVIDUAL

For Assignment of License for
Television Station WOAC(TV),
Channel 67, Canton, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1992; Released: January 24, 1992

By the Commission:

1. The Commission has under consideration: (1) an application for review filed on behalf of Franklin L. Lavin (Lavin) seeking review of the Mass Media Bureau's action granting the above-captioned *pro forma* application (FCC Form 316) for consent to assign the license of station WOAC-TV, Canton, Ohio, from Canton 67, Ltd., Debtor-in-Possession (Canton), to Morton J. Kent, individual;[1] (2) a joint opposition filed by Canton and Morton J. Kent (referred to jointly as the applicants); and (3) related pleadings.

BACKGROUND

2. Canton 67, Ltd., is a limited partnership comprised of three general partners, namely: Morton Kent (33% equity interest); Media Central, Inc., controlled by Kent (22% equity interest); and David R. Vaughn (1% equity interest). The remaining equity is held by the limited partners. The partnership agreement provides that the general partners must unanimously agree before any action can be taken that affects the partnership. Thus, each of the general partners possessed negative control of the licensee.[2] This partnership was approved by the Commission on a *pro forma* application (BAPCT-820323HS) granted on June 3, 1982. Prior to this, on September 23, 1981, the Commission approved the long-form (FCC Form 314) acquisition of WOAC(TV) by Kent, and Media Central, Inc., dba Canton 67, a partnership (BAPCT-810611KG). At that time, Vaughn was disclosed in the application as being a director and 7.5% shareholder of Media Central, Inc. In July of 1987, Media Central sought federal protection from creditors under Chapter 11 of the U.S. Bankruptcy Code for WOAC(TV) and seven other independent UHF television stations that it controlled and/or managed. The *pro forma* application (BALCT-871002KG) for involuntary assignment of the license of WOAC-TV from Canton 67, Ltd. to Canton 67, Ltd., Debtor-in-Possession, was approved by the Commission on October 20, 1987.

3. On December 17, 1990, the Mass Media Bureau granted the above-captioned *pro forma* application and denied an informal objection filed by Franklin L. Lavin. The applicants consummated the transaction on December 20, 1990. The Bureau affirmed that grant on March 15, 1991 and denied Lavin's petition for reconsideration. In his objection, Lavin argued that the application should be denied because: (1) the transfer of control from Canton 67, Ltd., Debtor-in-Possession, to Kent is a substantial change requiring the filing of a long-form application; (2) there had been three alleged unauthorized transfers of control of the licensee as a result of alleged sales of Vaughn's partnership interest during Kent's ownership and management; (3) Kent is not financially qualified, having managed eight broadcast stations into bankruptcy; and (4) Section 308 of the Communications Act of 1934, as amended, requires the Commission to consider Kent's financial qualifications.

4. In denying Lavin's petition for reconsideration and affirming its previous action, the staff concluded that Kent was passed on in a previous long-form application and thus is permitted to increase his interest by using a short-form application. The staff noted that Kent not only had negative control of the licensee but also held 55 percent of its equity. Additionally, with respect to the unauthorized transfers of Vaughn's partnership interest, the staff concluded that no purpose would be served by undertaking an investigation of the alleged ownership change or imposing sanctions on the applicant in view of the licensee's efforts to elicit information from an apparently unresponsive partner (Vaughn). The staff also observed that the licensee was subject to the jurisdiction of the bankruptcy court and noted the Commission's practice of considering the policies underlying the bankruptcy laws in making its own public interest determination. Further, in regard to Kent's financial qualifications, the staff stated that "Section 308 of the Act merely provides that the Commission, in considering an applicant's qualifications, may provide standards regarding financial ability, if the Commission chooses to consider financial qualifications." Thus, the staff concluded that, since no financial showing is required for *pro forma* applications, it did not need to examine Kent's financial qualifications in this case.

APPLICATION FOR REVIEW

5. In his application for review, Lavin claims that the Bureau's finding is novel and warrants Commission review because this is allegedly the first instance where a limited partnership was permitted to assign its license to a general partner on a shortform application. He states that neither Kent nor the Bureau cited a case in which short-

[1] According to Kent, Lavin previously attempted to purchase station WOAC-TV.

[2] Kent possessed negative control both as an individual partner and as controlling stockholder of Media Central.

form approval was given in such a case.[3] The special nature of limited partnerships and the unique facts of this case, Lavin asserts, obligate the Commission to require Kent to file a long-form application (FCC Form 314). That is especially true here, he states, since it does not appear that Canton's limited partners were insulated from participating in the management and operation of the station. By assigning the license to himself, Lavin argues, Kent "squeezed out" two general partners and numerous limited partners, each of which had some voice in the licensee's operations. Citing *Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 (1987) (*Tequesta*); and *C. Ray Helton*, 4 FCC Rcd 1205, 1206-07 (HDO 1989) (*Helton*), he contends that the "squeeze out" involved a "substantial change" in the ownership of the licensee requiring the filing of the long-form application.

6. Additionally, Lavin argues that the Bureau's refusal to consider the bankruptcies and allegations of financial mismanagement relating to Kent conflicts with Section 308 of the Communications Act and Commission policy. He claims that the purpose of the policy is to prevent what he alleges Kent has done -- bankrupt eight television stations. Therefore, Lavin maintains, Kent should be required to demonstrate that he will not again send WOAC(TV) into bankruptcy.

7. Citing *L. B. Wilson, Inc. v. FCC*, 397 F.2d 717, 721 (D.C. Cir. 1968), and *Stereo Broadcasters, Inc.*, 87 FCC2d 87 (1981), *recon. denied*, 50 RR2d 1346 (1982), Lavin also argues that, since there were three alleged unauthorized transfers of control of the licensee under Kent's guidance, the Bureau's acceptance of anything less than full compliance with Section 310(d) of the Communications Act and Commission Rules is unjustified and contrary to precedent.[4] Moreover, he states, Canton's efforts to determine the identity of the third general partner fall short of its obligation as a licensee since Kent, one of the partners, knew at some point that the interest had been transferred. In this regard, Lavin notes that all operational decisions required a unanimous vote of all the partners. He asserts that the applicants' explanation concerning the confusion and ambiguity surrounding the issue of the third general partner does not negate the fact that the licensee violated Section 310 of the Act by failing to report these changes in ownership to the Commission. Citing *Peoria Community Broadcasting, Inc., Debtor-in-Possession*, 79 FCC2d 311, 318 (1980) (*Peoria*), Lavin avers that the Commission has rejected the "confusion" defense. Additionally, he states that in *Peoria* the Commission also rejected the argument that the bankruptcy court's control of assets excused violation of Section 310(d) where the transfer occurred five months before the filing of bankruptcy. Here, Lavin alleges, the licensee's violations were more egregious because it was represented by counsel and because Kent had reason not to disclose the new controlling owners.[5] Moreover, he states that at no time during this proceeding did Kent submit a sworn statement to substantiate his position before the Commission. Lavin maintains that Kent's attempt to rely on the protection of the bankruptcy court is without support in fact or law.

8. Further, Lavin asserts, the staff's statement in its March 1991 letter, that "even if Mr. Vaughn had transferred his one-percent interest, such an action would have no impact on the station's assets because all of those assets were frozen by the filing of the Chapter 11 petition in 1987," constitutes a material error of fact. In this regard, he claims that the first two transfers occurred seventeen months before Canton filed for bankruptcy. In addition, Lavin argues, the Bureau's holding that bankruptcy can shield licensees from statutory responsibilities is unprecedented, factually unsupported, contrary to the Communications Act, and conflicts with Commission policy because the Commission cannot delegate its statutory duties to the judicial branch.[6] Citing *D.H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400, 401-403 (N.D. Ohio 1983), he submits that there is some question of whether the license is even part of the bankrupt estate and subject to the bankruptcy court's jurisdiction.

OPPOSITION

9. The applicants maintain that, because Kent controlled two of the three general partners of Canton, the transfer of control was not a substantial change.[7] They state that the use of a *pro forma* application, FCC Form 316, is appropriate when less than a controlling interest in a partnership is sought to be transferred. The applicants further state that, to the extent it can be claimed that Vaughn -- the third general partner -- possessed negative control over the licensee by virtue of his ability to exercise veto power by preventing the required unanimous agreement of all three general partners, the proposed assignment falls within the *Barnes* exception. Additionally, they aver that the partnership has not voted on any matters since prior to the time the first transfer of Vaughn's interest is alleged to have taken place. Further, they state that Canton's limited partners did not exercise control over the management and operation of

---

[3] Lavin claims that the case cited by Kent and the Bureau, *Barnes Enterprises, Inc.*, 55 FCC2d 721 (1975) (*Barnes*), does not address the nature of limited partnerships. In *Barnes*, we note, the Commission stated that negative control (50%) can be transferred on a short-form application where the parties not only had 50 percent of voting control of the licensee, but also held 50 percent of its equity. *Id.* at 725 n.4.

[4] Lavin alleges that, on February 20, 1986, Vaughn assigned his interest to Consolidated Resources Corporation (CRC); in February 1986, Southmark Corporation (Southmark) bought CRC; and, on November 30, 1990, Welcare International, Inc., purchased the interest. Lavin has failed, however, to file any documents or affidavits from persons with first-hand knowledge of the facts to support his position that Vaughn has sold both his voting and equity interests.

[5] Lavin submits that one reason for not disclosing Southmark as a new partner was the fact that Southmark is a failed real estate development company allegedly linked to questionable dealings with Charles Keatings' Lincoln Savings and Loan. He maintains that, in 1987, Southmark and its affiliates were implicated in an investigation related to the collapse of the savings and loan industry. Thus, Lavin avers, the Commission would have scrutinized such an application closely.

[6] The staff letter cited *La Rose v. FCC*, 494 F.2d 1145, which states that the Commission should consider the policies underlying the bankruptcy laws in making its own public interest determination.

[7] The applicants state that Kent controls Media Central because he owns 22.06 percent of its voting stock directly and owns 100 percent of the voting stock of Kent Rentals, Inc., which owns 38.62 percent of the voting stock of Media Central.

WOAC(TV). The applicants note that the general partners in the Limited Partnership Agreement delegated the day-to-day management of the station to Media Central.

10. Additionally, the applicants state that the alleged transfer of Vaughn's one-percent general partnership interest does not reflect adversely on the applicants' qualifications. The applicants maintain that considerable effort has been made, as noted in their previous filings, to ascertain whether Vaughn continues to hold his one-percent general partnership interest in the licensee. Therefore, they aver that any remaining ambiguity as to the status of Vaughn's interest is not the result of an oversight or an attempt to obfuscate on the part of Kent.[8] The applicants believe that the transfer of the economic benefit associated with the one-percent partnership interest may have become confused with actual ownership of and control over the interest itself. In conclusion, the applicants assert that the grant of the subject application should be upheld because the grant was in the public interest and will further the important federal objective of protecting innocent creditors.[9]

DISCUSSION

11. Petitions to deny do not lie against *pro forma* applications under Section 309(c)(2)(B) of the Communications. Act. However, informal objections may be filed pursuant to Section 73.3587 of the Commission Rules. Even though informal objections are not subject to the requirements of a petition to deny, the informal objector still must set forth facts to support its concerns and a basis for the remedy it seeks.[10] For the reasons that follow, we find that Lavin has failed to establish error requiring a reversal of the staff's earlier decisions.

12. Section 310(d) of the Communications Act requires the filing of an application, and the subsequent approval of the Commission, before a transfer of control or assignment of license can be accomplished. In implementing this requirement of the Act, the Commission established Section 73.3540 of its Rules, which sets forth when a long-form application (FCC Form 314 or 315) or a short-form application (FCC Form 316) is required. Applications that do not involve a substantial change in control or ownership may be filed on FCC Form 316 (or a *pro forma* application). In *Barnes*, we set out the limits for the use of short-form procedures for assignment applications. These are: the party acquiring control must have been passed upon in an earlier long-form sales or a construction permit application; and less than 50 percent of the stock is changing hands. Further, in cases where two parties have negative control (that is, each owns exactly 50 percent of a licensee's stock), short-form procedures may be used when one stockholder buys out the other. 55 FCC2d at 725 n.4. In *Mize & Rowland Radio*, 86 FCC2d 782 (1981), we applied the standards set out in *Barnes* to partnership interests.

13. In the case before us, Kent was passed upon in 1981. He held negative control of the licensee before the bankruptcy, as well as a 55-percent equity interest.[11] By virture of the transfer of control from Canton 67 to Kent, Kent is going from negative to positive control, and less than 50 percent of the equity is changing hands. Accordingly, the use of short-form procedures is consistent with *Barnes* and correct.

14. The cases cited by Lavin (*Tequesta* and *Helton*, above) involved ownership amendments to pending applications for new stations, not the transfer of a license, and somewhat different considerations and a different rule (Section 73.3573(b)) apply to such amendments. In any event, even if those cases had involved an assignment of a permit or license, the conclusion that a substantial change had occurred in those cases was based on facts not before us here. In *Tequesta*, voting rights (50 percent) were transferred to a party who had not been passed upon. *Helton* involved a 100-percent change in control of a limited partnership applicant by substituting a new general partner. Thus, those cases are inapposite and do not govern here.

15. Additionally, we do not find that the staff's decision conflicts with Section 308 of the Act. In considering an applicant's qualifications, Section 308 provides that the Commission may provide standards regarding financial ability if it chooses to consider financial qualifications.[12] Under our Rules, an applicant for a *pro forma* change of control is not required to demonstrate financial qualifications. Having determined that the *pro forma* application is appropriate in this case, we need not examine Kent's finances. Further, we disagree with Lavin's contention that a financial showing should be required because of Kent's involvement in several bankruptcies and because questions allegedly exist regarding his past business practices. We note that a court-appointed examiner did raise

---

[8] The applicants maintain that they were informed by Vaughn's attorney in August, 1987 that Vaughn had transferred only his economic interest in Canton to CRC when CRC merged with Southmark. They aver that Vaughn had entered into an agreement to assign his partnership interest to CRC at an undetermined time in the future, but expressly subject to prior FCC approval. In 1990, the applicants claim, Vaughn's attorney again stated that Vaughn had transferred only his beneficial economic interest in the partnership and that the ownership of the one percent interest had not changed. They assert that the ambiguity regarding Vaughn's interest was highlighted later in certain documents filed with the bankruptcy court. The applicants further note that the transfer of any general partnership interest required the written consent of a majority in interest of the limited partners, which Vaughn had not attained. Thus, Vaughn's action would apparently have no effect because it was inconsistent with the partnership agreement.

[9] Lavin claims that this statement by the applicants is an attempt to invoke the *Second Thursday* doctrine. *See Second Thursday Corp.*, 22 FCC 2d 515 (1970). Although we agree with Lavin that the *Second Thursday* doctrine is not applicable in this case, that fact is not dispositive for reasons set out below.

[10] *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

[11] The bankruptcy court has found that the sale to Kent is the best course to protect the debtor and to maximize the assets available to creditors. Given our practice of considering the policies underlying the bankruptcy laws, we do not believe that the intervening change in status of the licensee to debtor in possession alters the applicability of *Barnes* to the present case. *See La Rose v. FCC*, above.

[12] Section 308(b) of the Communications Act, we note, provides that applications for station licenses shall set forth such facts as the Commission by regulation *"may* prescribe as to citizenship, character, financial, technical and other qualifications of the applicant...." (Emphasis added).

questions regarding Kent's business practices. However, the bankruptcy court considered the examiner's report and found Kent financially qualified. The fact that Kent was a shareholder and director of a corporation that sought federal protection from creditors under Chapter 11 of the Federal Bankruptcy Code for several stations that it managed does not raise, in and of itself, a substantial and material question of fact as to Kent's personal financial conditions. Accordingly, we find that Lavin has provided no basis for examining Kent's finances beyond that required in the context of a *pro forma* application.

16. Concerning the alleged violation of Section 310 of the Act, and the alleged unauthorized transfers of ownership, the applicants have explained the difficulties they had in attempting to determine whether any unauthorized transfers of Vaughn's interest had occurred. The applicants very candidly disclosed to us, in their ownership reports and other filings, their inability to determine the precise nature of Vaughn's actions. In fact, Vaughn would not respond to the licensee's inquiries. The applicants state, however, that it appears that Vaughn's interest-or the economic benefit associated with that interest-may have been transferred in November 1990 to Welcare without notice to Kent or the licensee.[13] This occurred approximately two months after the August 31, 1990 bankruptcy court's order approving the transfer of all of the station's assets to Kent, individually. Lavin's assertion that Kent had reasons not to disclose the new owners is speculative and unsupported.[14] Accordingly, we conclude that there are no substantial and material questions of fact regarding Kent's qualifications raised by any possible unauthorized transfer of ownership interests.

17. In view of the foregoing, we find that Lavin has failed to demonstrate that the Mass Media Bureau erred in granting the subject assignment application. Accordingly, IT IS ORDERED, That the action of the Mass Media Bureau granting Morton J. Kent's acquisition of WOAC(TV), IS AFFIRMED, and Franklin L. Lavin's application for review IS DENIED.

18. Copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[13] We again note that the applicants state that Vaughn's attorney advised them that Vaughn had transferred only his beneficial economic interest in the partnership and that the ownership of the one percent interest had not changed.

[14] Further, contrary to Lavin's contention, we find that the staff's letter decision did not conclude that bankruptcy can excuse licensees from statutory responsibilities. The staff merely noted the efforts of Kent to elicit information from an unresponsive partner. Citing the licensee's bankrupt status and our policy of taking into account the policies underlying the bankruptcy laws, the staff correctly concluded that no purpose would be served by an investigation of an alleged ownership change or imposition of a penalty. Lavin has submitted no new information to warrant overturning the staff's ruling.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-306

In the Matter of

Amendment of Section 73.202(b), RM-7824
Table of Allotments,
FM Broadcast Stations.
(Safford, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 23, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC 6056 (1991), issued in response to a petition filed on behalf of P & M Broadcasting, Inc. ("petitioner"), licensee of Station KXKQ(FM), Channel 231C1, Safford, Arizona. The *Notice* proposed the substitution of Channel 231C for Channel 231C1 and modification of Station KXKQ(FM)'s license to specify operation on the higher powered channel. Petitioner filed comments in support of the upgrade, reaffirming interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 231C for Channel 231C1 at Safford, Arizona, since it would provide the community with a wide coverage FM station. The substitution can be made in compliance with the minimum separation requirements of Section 73.207 of the Commission's Rules at petitioner's licensed site.[1] In addition, we have authorized a modification of the petitioner's construction permit for Station KXKQ(FM), Channel 231C1, Safford, Arizona, to specify operation on Channel 231C in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Safford, Arizona	231C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KXKQ(FM), Safford, Arizona, IS MODIFIED to specify operation on Channel 231C in lieu of Channel 231C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to the Commission's Rules Sections 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, P & M Broadcasting, licensee of Station KXKQ(FM), Channel 231C1, Safford, Arizona, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 231C1 at Safford are North Latitude 32-49-30 and West Longitude 109-45-30. Although the petitioner's site is within 320 kilometers (199 miles) of the Mexican border, additional concurrence from Mexico is not required for this proposed change in power. Mexican concurrence was originally obtained at the time of allotment for Channel 231C, prior to the station's downgrade in 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-315

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Perham, Minnesota)	RM-7830

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 13, 1992; Released: January 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 6490 (1991), issued in response to a petition filed by John A. Brush, Yvonne M. Brush and Amy C. Rutledge ("petitioner"). The *Notice* proposed the allotment of Channel 258A to Perham, Minnesota, as that community's first local service. Petitioner filed comments reaffirming its interest in the allotment of Channel 258A to Perham.

2. We believe the public interest would be served by allotting Channel 258A to Perham, Minnesota, as it will provide the community with its first local service. Channel 258A can be allotted to Perham, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Perham is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Perham, Minnesota	258A

4. The window period for filing applications for Channel 258A, Perham, Minnesota, will open on **March 10, 1992,** and close on **April 9, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258A at Perham are 46-35-42 and 95-34-24.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

21538
DA 92-109

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.
Cellular Recorded Information 202-653-5858

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

CELLULAR MSA/RSA MARKETS AND COUNTIES

Report No. CL-92-40 January 24, 1992

In order to consolidate information, this public notice is issued to provide a listing of all cellular markets with the appropriate counties involved. The list was compiled from the 1980 US Census and various public notices. Questions should be directed to Steve Markendorff at 202-653-5560.

1. New York, NY-NJ/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ
Counties - Bronx NY, Kings NY, New York NY, Queens NY, Richmond NY, Putnam NY, Rockland NY, Westchester NY, Bergen NJ, Nassau NY, Suffolk NY, Essex NJ, Morris NJ, Somerset NJ, Union NJ, Hudson NJ and Passaic NJ

2. Los Angeles-Long Beach/Anaheim-Santa Ana-Garden Grove/ Riverside-San Bernardino-Ontario, CA
Counties - Los Angeles, Orange, Riverside and San Bernardino

3. Chicago, IL
Counties - Cook, Du Page, Kane, Lake, McHenry and Will

4. Philadelphia, PA
Counties - Bucks, Chester, Delaware, Montgomery, Philadelphia, Burlington, Camden and Gloucester

5. Detroit/Ann Arbor, MI
Counties - Lapeer, Livingston, Macomb, Oakland, St. Clair, Wayne and Washtenaw

6. **Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH**
   Counties - Essex MA, Middlesex MA, Norfolk MA, Plymouth MA, Suffolk MA and Rockingham NH

7. **San Francisco-Oakland, CA**
   Counties - Alameda, Contra Costa, Marin, San Francisco and San Mateo

8. **Washington, DC-MD-VA**
   Counties - District of Columbia, Charles MD, Montgomery MD, Prince Georges MD, Alexandria city VA, Farifax city VA, Falls Church city VA, Manassas city VA, Manassas Park city VA, Arlington VA, Fairfax VA, Loudoun VA and Prince William VA

9. **Dallas-Forth Worth, TX**
   Counties - Collin, Dallas, Denton, Ellis, Hood, Johnson, Kaufman, Parker, Rockwall, Tarrant and Wise

10. **Houston, TX**
    Counties - Brazona, Fort Bend, Harris, Liberty, Montgomery and Waller

11. **St. Louis, MO-IL**
    Counties - St. Louis city MO, Franklin MO, Jefferson MO, St. Charles MO, St. Louis MO, Clinton IL, Madison IL, Monroe IL and St. Clair, IL

12. **Miami-Fort Lauderdale-Hollywood, FL**
    Counties - Dade and Broward

13. **Pittsburgh, PA**
    Counties - Allegheny, Beaver, Washington and Westmoreland

14. **Baltimore, MD**
    Counties - Baltimore city, Anne Arundel, Baltimore, Carroll, Harford and Howard

15. **Minneapolis-St. Paul, MN-WI**
    Counties - Anoka MN, Carver MN, Chisago MN, Dakota MN, Hennepin MN, Ramsey MN, Scott MN, Washington MN, Wright MN and St. Croix WI

16. **Cleveland, OH**
    Counties - Cuyahoga, Geauga, Lake and Medina

17. **Atlanta, GA**
    Counties - Butts, Cherokee, Clayton, Cobb, De Kalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale and Walton

18. **San Diego, CA**
Counties - San Diego

19. **Denver-Boulder, CO**
Counties - Adams, Arapahoe, Boulder, Denver, Douglas, Gilpin and Jefferson

20. **Seattle-Everett, WA**
Counties - King and Snohomish

21. **Milwaukee, WI**
Counties - Milwaukee, Ozaukee, Washington and Waukesha

22. **Tampa-St. Petersburg, FL**
Counties - Hillsborough, Pasco and Pinellas

23. **Cincinnati, OH-KY-IN**
Counties - Clermont OH, Hamilton OH, Warren OH, Boone KY, Campbell KY, Kenton KY and Dearborn IN

24. **Kansas City, MO-KS**
Counties - Cass MO, Clay MO, Jackson MO, Platte MO, Ray MO, Johnson KS and Wyandotte KS

25. **Buffalo, NY**
Counties - Erie and Niagara

26. **Phoenix, AZ**
Counties - Maricopa

27. **San Jose, CA**
Counties - Santa Clara

28. **Indianapolis, IN**
Counties - Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan and Shelby

29. **New Orleans, LA**
Counties - Jefferson Parish, Orleans Parish, St. Bernard Parish and St. Tammany Parish

30. **Portland, OR-WA**
Counties - Clackamas OR, Moltnomah OR, Washington OR and Clark WA

31. **Columbus, OH**
Counties - Delaware, Fairfield, Franklin, Madison and Pickaway

32. **Hartford-New Britain-Bristol, CT**
Counties - Hartford, Middlesex, and Tolland

33. **San Antonio, TX**
Counties - Bexar, Comal and Guadalupe

34. **Rochester, NY**
Counties - Livingston, Monroe, Ontario, Orleans and Wayne

35. **Sacramento, CA**
Counties - Placer, Sacramento and Yolo

36. **Memphis, TN-AR-MS**
Counties - Shelby TN, Tipton TN, Crittenden AR and De Soto MS

37. **Louisville, KY-IN**
Counties - Bullitt KY, Jefferson KY, Oldham KY, Clark IN and Floyd IN

38. **Providence-Warwick-Pawtucket, RI**
Counties - Bristol, Kent, Providence and Washington

39. **Salt Lake City-Ogden, UT**
Counties - Davis, Salt Lake, Tooele and Weber

40. **Dayton, OH**
Counties - Greene, Miami, Montgomery and Preble

41. **Birmingham, AL**
Counties - Jefferson, St. Clair, Shelby and Walker

42. **Bridgeport-Stamford-Norwalk-Danbury, CT**
Counties - Fairfield

43. **Norfolk-Virginia Beach-Portsmouth, VA/NC**
Counties - Cheasapeake city VA, Norfolk city VA, Portsmouth city VA, Suffolk city VA, Virginia Beach city VA and Currituck NC

44. **Albany-Schenectady-Troy, NY**
Counties - Albany, Montgomery, Rensselaer, Saratoga and Schenectady

45. **Oklahoma City, OK**
Counties - Canadian, Cleveland, McClain, Oklahoma and Pottawatomie

46. **Nashville-Davidson, TN**
Counties - Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson and Wilson

47. **Greensboro-Winston-Salem-High Point, NC**
Counties - Davidson, Forsyth, Guilford, Randolph, Stokes and Yadkin

48. **Toledo, OH-MI**
Counties - Fulton OH, Lucas OH, Ottawa OH, Wood OH and Monroe MI

49. **New Haven-West Haven-Waterbury-Meriden, CT**
Counties - New Haven

50. **Honolulu, HI**
Counties - Honolulu

51. **Jacksonville, FL**
Counties - Baker, Clay, Duval, Nassau and St. Johns

52. **Akron, OH**
Counties - Portage and Summit

53. **Syracuse, NY**
Counties - Madison, Onondaga and Oswego

54. **Gary-Hammond-East Chicago, IN**
Counties - Lake and Porter

55. **Worchester-Fitchburg-Leominster, MA**
Counties - Worchester

56. **Northeast Pennsylvania, PA**
Counties - Lackawanna, Luzerne and Monroe

57. **Tulsa, OK**
Counties - Creek, Mayes, Osage, Rogers, Tulsa and Wagoner

58. **Allentown-Bethlehem-Easton, PA-NJ**
Counties - Carbon PA, Lehigh PA, Northampton PA and Warren NJ

59. **Richmond, VA**
Counties - Richmond city, Charles City, Chesterfield, Goochland, Hanover, Henrico, New Kent and Powhatan

60. **Orlando, FL**
Counties - Orange, Osceola and Seminole

61. **Charlotte-Gastonia, NC**
Counties - Gaston, Meklenburg and Union

62. **New Brunswick-Perth Amboy-Sayreville, NJ**
Counties - Middlesex

63. **Springfield-Chicopee-Holyoke, MA**
Counties - Hampden and Hampshire

64. **Grand Rapids, MI**
Counties - Kent and Ottawa

65. **Omaha, NB-IA**
Counties - Douglas NB, Sarpy NB and Pottawattamie IA

66. **Youngstown-Warren, OH**
Counties - Mahoning and Trumbull

67. **Greenville-Spartanburg, SC**
Counties - Greenville, Pickens and Spartanburg

68. **Flint, MI**
Counties - Genessee and Shiawassee

69. **Wilmington, DE-NJ-MD**
Counties - New Castle DE, Salem NJ and Cecil MD

70. **Long Branch-Asbury Park, NJ**
Counties - Monmouth

71. **Raleigh-Durham, NC**
Counties - Durham, Orange and Wake

72. **West Palm Beach-Boca Raton, FL**
Counties - Palm Beach

73. **Oxnard-Simi Valley-Ventura, CA**
Counties - Ventura

74. **Fresno, CA**
Counties - Fresno

75. **Austin, TX**
Counties - Hays, Travis and Williamson

76. **New Bedford-Fall River, MA**
Counties - Bristol

77. **Tuscon, AZ**
Counties - Pima

78. **Lansing-East Lansing, MI**
Counties - Clinton, Eaton, Ingham and Ionia

79. **Knoxville, TN**
Counties - Anderson, Blount, Knox and Union

80. **Baton Rouge, LA**
Counties - Ascension Parish, East Baton Rouge Parish, Livingston Parish and West Baton Rouge Parish

81. **El Paso, TX**
Counties - El Paso

82. **Tacoma, WA**
Counties - Pierce

83. **Mobile, AL**
Counties - Baldwin and Mobile

84. **Harrisburg, PA**
Counties - Cumberland, Dauphin and Perry

85. **Johnson City-Kingsport-Bristol, TN-VA**
Counties - Carter TN, Hawkins TN, Sullivan TN, Unicoi TN, Washington TN, Bristol City VA, Scott VA and Washington VA

86. **Albuquerque, NM**
Counties - Bernalillo and Sandoval

87. **Canton, OH**
Counties - Carroll and Stark

88. **Chattanooga, TN-GA**
Counties - Hamilton TN, Marion TN, Sequatchie TN, Catoosa GA, Dade GA and Walker GA

89. **Wichita, KS**
Counties - Butler and Sedgwick

90. **Charleston-North Charleston, SC**
Counties - Berkeley, Charlestown and Dorchester

91. **San Juan-Caguas, PR**
    Counties - Aguas Buenas Municipio, Barceloneta Municipio, Bayamon Municipio, Caguas Municipio, Canovanas Municipio, Carolina Municipio, Catano Municipio, Cayey Municipio, Cidra Municipio, Corozal Municipio, Dorado Municipio, Farjardo Municipio, Florida Municipio, Guaynabo Municipio, Gurabo Municipio, Humacao Municipio, Juncos Municipio, Las Piedras Municipio, Loiza Municipio, Luquillo Municipio, Manati Municipio, Naranjito Municipio, Rio Grande Municipio, San Juan Municipio, San Lorenzo Municipio, Toa Alta Municipio, Toa Baja Municipio, Trujillo Alto Municipio, Vega Alta Municipio, Vega Baja Municipio

92. **Little Rock-North Little Rock, AR**
    Counties - Faulkner, Lonoke, Pulaski and Saline

93. **Las Vegas, NV**
    Counties - Clark

94. **Saginaw-Bay City-Midland, MI**
    Counties - Bay, Midland and Saginaw

95. **Columbia, SC**
    Counties - Lexington and Richland

96. **Fort Wayne, IN**
    Counties - Adams, Allen, DeKalb, Wells and Whitley

97. **Bakersfield, CA**
    Counties - Kern

98. **Davenport-Rock Island-Moline, IA/IL**
    Counties - Henry IL, Rock Island IL and Scott IA

99. **York, PA**
    Counties - Adams and York

100. **Shreveport, Louisiana**
    Counties - Bossier Parish, Caddo Parish and Webster Parish

101. **Beaumont-Port Arthur, TX**
    Counties - Hardin, Jefferson and Orange

102. **Des Moines, IA**
    Counties - Dallas, Polk and Warren

103. **Peoria, IL**
    Counties - Peoria, Tazewell and Woodford

104. **Newport News-Hampton, VA**
    Counties - Gloucester, Hampton city, James City, Newport News city, Poquoson city, Williamsburg city and York

105. **Lancaster, PA**
Counties - Lancaster

106. **Jackson, MS**
Counties - Hinds, Madison and Rankin

107. **Stockton, CA**
Counties - San Joaquin

108. **Augusta, GA/SC**
Counties - Aiken SC, Columbia GA, McDuffie GA and Richmond GA

109. **Spokane, WA**
Counties - Spokane

110. **Huntington-Ashland, WV/KY/OH**
Counties - Boyd KY, Cabell WV, Carter KY, Greenup KY, Lawrence OH and Wayne WV

111. **Vallejo-Fairfield-Napa, CA**
Counties - Napa and Solano

112. **Corpus Christi, TX**
Counties - Nueces and San Patricio

113. **Madison, WI**
Counties - Dane

114. **Lakeland-Winter Haven, FL**
Counties - Polk

115. **Utica-Rome, NY**
Counties - Herkimer and Oneida

116. **Lexington-Fayette, KY**
Counties - Bourbon, Clark, Fayette, Jessamine, Scott and Woodford

117. **Colorado Springs, CO**
Counties - El Paso and Teller

118. **Reading, PA**
Counties - Berks

119. **Evansville, IN/KY**
Counties - Gibson IN, Henderson KY, Posey IN, Vanderburgh IN and Warrick IN

120. **Huntsville, AL**
Counties - Limestone, Madison and Marshall

121. **Trenton, NJ**
Counties - Mercer

122. **Binghamton, NY**
Broome, Susquehanna and Tioga

123. **Santa Rosa-Petaluma, CA**
Counties - Sonoma

124. **Santa Barbara-Santa Maria-Lompoc, CA**
Counties - Santa Barbara

125. **Appleton-Oskosh-Neenah, WI**
Counties - Calumet, Outagamie and Winnebago

126. **Salinas-Seaside-Monterey, CA**
Counties - Monterey

127. **Pensacola, FL**
Counties - Escambia and Santa Rosa

128. **McAllen-Edinburg-Mission, TX**
Counties - Hidalgo

129. **South Bend-Mishawaka, IN**
Counties - Marshall and St. Joseph

130 **Erie, PA**
Counties - Erie

131. **Rockford, IL**
Counties - Boone and Winnebago

132. **Kalamazoo, MI**
Counties - Kalamazoo and Van Buren

133. **Manchester-Nashua, NH**
Counties - Hillsborough

134. **Atlantic City, NJ**
Counties - Atlantic and Cape May

135. **Eugene-Springfield, OR**
Counties - Lane

136. **Lorain-Elyria, OH**
Counties - Lorain

137. **Melbourne-Titusville-Palm Bay, FL**
Counties - Brevard

138. **Macon-Warner Robins, GA**
Counties - Bibb, Houston, Jones, Peach and Twiggs

139. **Montgomery, AL**
Counties - Autauga, Elmore and Montgomery

140. **Charleston, WV**
Counties - Kanawha and Putnam

141. **Duluth, MN-WI**
Counties - Douglas WI and St. Louis MN

142. **Modesto, CA**
Counties - Stanislaus

143. **Johnstown, PA**
Counties - Cambria and Somerset

144. **Orange County, NY**
Counties - Orange

145. **Hamilton-Middletown, OH**
Counties - Butler

146. **Daytona Beach, FL**
Counties - Volusia

147. **Ponce, PR**
Counties - Juana Diaz Municipio, Ponce Municipio and Villalba Municipio

148. **Salem, OR**
Counties - Marion and Polk

149. **Fayetteville, NC**
Counties - Cumberland

150. **Visalia-Tulare-Porterville, CA**
Counties - Tulare

151. **Poughkeepsie, NY**
Counties - Dutchess

152 **Portland, ME**
Counties - Cumberland and Sagadahoc

153. **Columbus, GA-AL**
Counties - Chattahoochee GA, Muscogee GA and Russell AL

154. **New London-Norwich, CT**
Counties - New London

155. **Savannah, GA**
Counties - Bryan, Chatham and Effingham

156. **Portsmouth-Dover-Rochester, NH-ME**
Counties - Strafford NH and York ME

157. **Roanoke, VA**
Counties - Botetourt, Craig, Roanoke, Roanoke city and Salem city

158. **Lima, OH**
Counties - Allen, Auglaize, Putnam and Van Wert

159. **Provo-Orem, UT**
Counties - Utah

160. **Killeen-Temple, TX**
Counties - Bell and Coryell

161. **Lubbock, TX**
Counties - Lubbock

162. **Brownsville-Harlingen, TX**
Counties - Cameron

163. **Springfield, MO**
Counties - Christian and Greene

164. **Fort Myers, FL**
Counties - Lee

165. **Fort Smith, AK-OK**
Counties - Crawford AR, LeFlore OK, Sebastian AR and Sequoyah OK

166. **Hickory, NC**
Counties - Alexander, Burke and Catawba

167. **Sarasota, FL**
Counties - Sarasota

168. **Tallahassee, FL**
Counties - Gadsden, Leon and Wakulla

169. **Mayaguez, PR**
Counties - Anasco Municipio, Cabo Rojo Municipio, Hormigueros Municipio, Mayaguez Municipio and San German Municipio

170. **Galveston-Texas City, TX**
Counties - Galveston

171. **Reno, NV**
Counties - Washoe

172. **Lincoln, NE**
Counties - Lancaster

173. Biloxi-Gulfport, MS
Counties - Hancock, Harrison and Stone

174. Lafayette, LA
Counties - Lafayette Parish and St. Martin Parish

175. Santa Cruz, CA
Counties - Santa Cruz

176. Springfield, IL
Counties - Menard and Sagamon

177. Battle Creek, MI
Counties - Barry and Calhoun

178. Wheeling, WV-OH
Counties - Belmont OH, Marshall WV and Ohio WV

179. Topeka, KS
Counties - Jefferson, Osage and Shawnee

180. Springfield, OH
Counties - Champaign and Clark

181. Muskegon, MI
Counties - Muskegon and Oceana

182. Fayetteville-Springdale, AK
Counties - Benton and Washington

183. Asheville, NC
Counties - Buncombe and Madison

184. Houma-Thibodaux, LA
Counties - Lafourche Parish and Terrebonne Parish

185. Terre Haute, IN
Counties - Clay, Sullivan, Vermillion and Vigo

186. Green Bay, WI
Counties - Brown

187. Anchorage, AK
Counties - Anchorage Borough

188. Amarillo, TX
Counties - Potter and Randall

189. Racine, WI
Counties - Racine

190. **Boise City, ID**
Counties - Ada

191. **Yakima, WA**
Counties - Yakima

192. **Gainesville, FL**
Counties - Alachua and Bradford

193. **Benton Harbor, MI**
Counties - Berrien

194. **Waco, TX**
Counties - McLennan

195. **Cedar Rapids, IA**
Counties - Linn

196. **Champaign-Urbana-Rantoul, IL**
Counties - Champaign

197. **Lake Charles, LA**
Counties - Calcasieu Parish

198. **St. Cloud, MN**
Counties - Benton, Sherburne and Stearns

199. **Steubenville-Weirton, OH-WV**
Counties - Brooke WV, Hancock WV and Jefferson OH

200. **Parkersburg-Marietta, OH-WV**
Counties - Washington, Wirt and Wood

201. **Waterloo-Cedar Falls, IA**
Counties - Black Hawk and Bremer

202. **Arecibo, PR**
Counties - Arecibo Municipio, Camuy Municipio, Hatillo Municipio and Quebradillas Municipio

203. **Lynchburg, VA**
Counties - Amherst, Appomattox, Campbell and Lynchburg city

204. **Aguadilla, PR**
Counties - Aguada Municipio, Aguadilla Municipio, Isabella Municipio and Moca Municipio

205. **Alexandria, LA**
Counties - Grant Parish and Rapides Parish

206. **Longview-Marshall, TX**
Counties - Gregg and Harrison

207. Jackson, MI
Counties - Jackson

208. Fort Pierce, FL
Counties - Martin and St. Lucie

209. Clarksville-Hopkinsville, TN/KY
Counties - Christian KY and Montgomery TN

210. Fort Collins-Loveland, CO
Counties - Larimer

211. Bradenton, FL
Counties - Manatee

212. Bremerton, WA
Counties - Kitsap

213. Pittsfield, MA
Counties - Berkshire

214. Richland-Kennewick-Pasco, WA
Counties - Benton and Franklin

215 Chico, CA
Counties - Butte

216. Janesville-Beloit, WI
Counties - Rock

217. Anderson, IN
Counties - Madison

218. Wilmington, NC
Counties - Brunswick and New Hanover

219. Monroe, LA
Counties - Ouachita Parish

220. Abilene, TX
Counties - Callahan, Jones and Taylor

221. Fargo-Moorehead, ND-MN
Counties - Cass ND and Clay MN

222. Tuscaloosa, AL
Counties - Tuscaloosa

223. Elkhart-Goshen, IN
Counties - Elkhart

224. **Bangor, ME**
Counties - Penobscot

225. **Altoona, PA**
Counties - Blair

226. **Florence, AL**
Counties - Colbert and Lauderdale

227. **Anderson, SC**
Counties - Anderson

228. **Vineland-Millville-Bridgeton, NJ**
Counties - Cumberland

229. **Medford, OR**
Counties - Jackson

230. **Decatur, IL**
Counties - Macon

231. **Mansfield, OH**
Counties - Richland

232. **Eau Claire, WI**
Counties - Chippewa and Eau Claire

233. **Wichita Falls, TX**
Counties - Clay and Witchita

234. **Athens, GA**
Counties - Clarke, Jackson, Madison and Oconee

235. **Petersburg-Colonial Heights-Hopewell, VA**
Counties - Colonial Heights city, Dinwiddie, Hopewell city, Petersburg city and Prince George

236. **Muncie, IN**
Counties - Delaware

237. **Tyler, TX**
Counties - Smith

238. **Sharon, PA**
Counties - Mercer

239. **Joplin, MO**
Counties - Jasper and Newton

240. **Texarkana, TX - Texarkana, AR**
Counties - Bowie TX, Little River AR and Miller AR

241. **Pueblo, CO**
Counties - Pueblo

242. **Olympia, WA**
Counties - Thurston

243. **Greeley, CO**
Counties - Weld

244. **Kenosha, WI**
Counties - Kenosha

245. **Ocala, FL**
Counties - Marion

246. **Dothan, AL**
Counties - Dale and Houston

247. **Lafayette, IN**
Counties - Tippecanoe

248. **Burlington, VT**
Counties - Chittenden and Grand Isle

249. **Anniston, AL**
Counties - Calhoun

250. **Bloomington-Normal, IL**
Counties - McLean

251. **Williamsport, PA**
Counties - Lycoming

252. **Pascagoula, MI**
Counties - Jackson

253. **Sioux City, IA-NE**
Counties - Dakota NE and Woodbury IA

254. **Redding, CA**
Counties - Shasta

255. **Odessa, TX**
Counties - Ector

256. **Charlottesville, VA**
Counties - Albemarle, Charlottesville city, Fluvana and Greene

257. **Hagerstown, MD**
Counties - Washington

258. Jacksonville, NC
Counties - Onslow

259. State College, PA
Counties - Centre

260. Lawton, OK
Counties - Comanche

261. Albany, GA
Counties - Dougherty and Lee

262. Danville, VA
Counties - Danville city and Pittsylvania

263. Wausau, WI
Counties - Marathon

264. Florence, SC
Counties - Florence

265. Fort Walton Beach, FL
Counties - Okaloosa

266. Glens Falls, NY
Counties - Warren and Washington

267. Sioux Falls, SD
Counties - Minnehaha

268. Billings, MT
Counties - Yellowstone

269. Cumberland, MD-WV
Counties - Allegany MD and Mineral WV

270. Bellingham, WA
Counties - Whatcom

271. Kokomo, IN
Counties - Howard and Tipton

272. Gadsden, AL
Counties - Etowah

273. Kankakee, IL
Counties - Kankakee

274. Yuba City, CA
Counties - Sutter and Yuba

275. **St. Joseph, MO**
Counties - Andrew and Buchanan

276. **Grand Forks, ND-MN**
Counties - Grand Forks ND and Polk MN

277. **Sheboygan, WI**
Counties - Sheboygan

278. **Columbia, MO**
Counties - Boone

279. **Lewiston-Auburn, ME**
Counties - Androscoggin

280. **Burlington, NC**
Counties - Alamance

281. **Laredo, TX**
Counties - Webb

282. **Bloomington, IN**
Counties - Monroe

283. **Panama City, FL**
Counties - Bay

284. **Elmira, NY**
Counties - Chemung

285. **Las Cruces, NM**
Counties - Dona Ana

286. **Dubuque, IA**
Counties - Dubuque

287. **Bryan-College Station, TX**
Counties - Brazos

288. **Rochester, MN**
Counties - Olmstead

289. **Rapid City, SD**
Counties - Meade and Pennington

290. **La Crosse, WI**
Counties - LaCrosse

291. **Pine Bluff, AK**
Counties - Jefferson

292. **Sherman-Denison, TX**
Counties - Grayson

293. **Owensboro, KY**
Counties - Daviess

294. **San Angelo, TX**
Counties - Tom Green

295. **Midland, TX**
Counties - Midland

296. **Iowa City, IA**
Counties - Johnson

297. **Great Falls, MT**
Counties - Cascade

298. **Bismarck, ND**
Counties - Burleigh and Morton

299. **Casper, WY**
Counties - Natrona

300. **Victoria, TX**
Counties - Victoria

301. **Lawrence, KS**
Counties - Douglas

302. **Enid, OK**
Counties - Garfield

303. **Aurora-Elgin, IL**
Counties - Kendall

304. **Joliet, IL**
Counties - Grundy

305. **Alton-Granite City, IL**
Counties - Jersey

306. **Gulf of Mexico**

LIST OF CELLULAR RURAL SERVICE AREAS WITH COMPONENT PARTS

ALABAMA

307. **Alabama 1 - Franklin**
Franklin
Marion
Winston
Cullman
Morgan
Lawrence
Blount

308. **Alabama 2 - Jackson**
Jackson
De Kalb
Cherokee

309. **Alabama 3 - Lamar**
Lamar
Fayette
Pickens
Sumter
Greene
Choctaw
Hale
Marengo

310. **Alabama 4 - Bibb**
Bibb
Perry
Dallas
Wilcox
Lowndes
Chilton

311. **Alabama 5 - Cleburne**
Cleburne
Talladega
Clay
Randolph
Coosa
Tallapoosa
Chambers

312. **Alabama 6 - Washington**
Washington
Clarke
Monroe
Conecuh
Escambia

ALABAMA (continued)

313. **Alabama 7 - Butler**
Butler
Covington
Crenshaw
Pike
Coffee
Geneva

314. **Alabama 8 - Lee**
Lee
Macon
Bullock
Barbour
Henry

ALASKA

315. **Alaska 1 - Wade Hampton**
Wade Hampton
Nome
Kobuk
North Slope
Yukon-Koyukuk
Fairbanks N. Star
Southeast Fairbanks

316. **Alaska 2 - Bethel**
Bethel
Dillingham
Bristol Bay Borough
Kodiak Island Borough
Kenai Peninsula Borough
Matanuska-Susitna Borough
Valdez-Cordova
Aleutian Islands

317. **Alaska 3 - Haines**
Haines Borough
Juneau Borough
Wrangell-Petersburg
Ketchikan-Gateway Borough
Sitka Borough
Skagway-Yakutat-Angoon
Prince of Wales-Outer Ketchikan

ARIZONA

318. Arizona 1 - Mohave
Mohave

319. Arizona 2 - Coconino
Coconino
Yavapai

320. Arizona 3 - Navajo
Navajo
Apache

321. Arizona 4 - Yuma
Yuma
La Paz

322. Arizona 5 - Gila
Gila
Pinal

323. Arizona 6 - Graham
Graham
Greenlee
Santa Cruz
Cochise

ARKANSAS

324. Arkansas 1 - Madison
Madison
Carroll
Boone
Newton

325. Arkansas 2 - Marion
Marion
Baxter
Fulton
Izard
Stone
Searcy

326. Arkansas 3 - Sharp
Sharp
Randolph
Lawrence
Independence
Jackson

ARKANSAS (Continued)

327. Arkansas 4 - Clay
Clay
Greene
Craighead
Poinsett
Mississippi

328. Arkansas 5 - Cross
Cross
St. Francis
Lee
Monroe
Phillips
Arkansas

329. Arkansas 6 - Cleburne
Cleburne
White
Woodruff
Prairie

330. Arkansas 7 - Pope
Pope
Yell
Perry
Conway
Van Buren

331. Arkansas 8 - Franklin
Franklin
Johnson
Logan
Scott

332. Arkansas 9 - Polk
Polk
Montgomery
Pike
Howard
Sevier

333. Arkansas 10 - Garland
Garland
Hot Spring
Clark
Dallas
Grant

ARKANSAS (Continued)

334. **Arkansas 11 - Hempstead**
Hempstead
Lafayette
Nevada
Columbia

335. **Arkansas 12 - Ouachita**
Ouachita
Calhoun
Bradley
Union
Cleveland
Lincoln
Drew
Ashley
Desha
Chicot

CALIFORNIA

336. **California 1 - Del Norte**
Del Norte
Siskiyou
Humboldt
Trinity

337. **California 2 - Modoc**
Modoc
Lassen
Plumas

338. **California 3 - Alpine**
Alpine
Amador
Calaveras
Tuolumne
Mariposa

339. **California 4 - Madera**
Madera
Merced
San Benito

340. **California 5 - San Luis Obispo**
San Luis Obispo

341. **California 6 - Mono**
Mono
Inyo

CALIFORNIA (Continued)

342. **California 7 - Imperial**
Imperial

343. **California 8 - Tehama**
Tehama
Glenn
Colusa

344. **California 9 - Mendocino**
Mendocino
Lake

345. **California 10 - Sierra**
Sierra
Nevada

346. **California 11 - El Dorado**
El Dorado

347. **California 12 - Kings**
Kings

COLORADO

348. **Colorado 1 - Moffat**
Moffat
Rio Blanco
Routt
Jackson
Grand

349. **Colorado 2 - Logan**
Logan
Sedgwick
Phillips
Morgan
Washington
Yuma

350. **Colorado 3 - Garfield**
Garfield
Eagle
Summit
Clear Creek
Pitkin
Gunnison
Delta
Mesa
Montrose

COLORADO (Continued)

351. **Colorado 4 - Park**
Park
Lake
Chaffee
Fremont
Custer

352. **Colorado 5 - Elbert**
Elbert
Lincoln
Kit Carson
Cheyenne

353. **Colorado 6 - San Miguel**
San Miguel
Ouray
Dolores
San Juan
Hinsdale
Montezuma
La Plata

354. **Colorado 7 - Saguache**
Saguache
Mineral
Rio Grande
Alamosa
Conejos
Archuleta

355. **Colorado 8 - Kiowa**
Kiowa
Crowley
Otero
Bent
Prowers

356. **Colorado 9 - Costilla**
Costilla
Huerfano
Las Animas
Baca

CONNECTICUT

357. **Connecticut 1 - Litchfield**
Litchfield

358. **Connecticut 2 - Windham**
Windham

DELAWARE

359. **Delaware 1 - Kent**
Kent
Sussex

FLORIDA

360. **Florida 1 - Collier**
Collier
Hendry

361. **Florida 2 - Glades**
Glades
Highlands
Okeechobee
Indian River

362. **Florida 3 - Hardee**
Hardee
De Soto
Charlotte

363. **Florida 4 - Citrus**
Citrus
Hernando
Lake
Sumter

364. **Florida 5 - Putnam**
Putnam
Flagler

365. **Florida 6 - Dixie**
Dixie
Levy
Gilchrist

366. **Florida 7 - Hamilton**
Hamilton
Suwannee
Columbia
Union

367. **Florida 8 - Jefferson**
Jefferson
Madison
Taylor
Lafayette

FLORIDA (Continued

368. **Florida 9 - Calhoun**
Calhoun
Gulf
Liberty
Franklin

369. **Florida 10 - Walton**
Walton
Holmes
Jackson
Washington

370. **Florida 11 - Monroe**
Monroe

GEORGIA

371. **Georgia 1 - Whitfield**
Whitfield
Murray
Gordon
Pickens
Gilmer
Fannin
Union
Towns

372. **Georgia 2 - Dawson**
Dawson
Lumpkin
White
Habersham
Hall
Banks
Franklin
Stephens
Rabun
Barrow

373. **Georgia 3 - Chattooga**
Chattooga
Floyd
Polk
Bartow

GEORGIA (Continued)

374. **Georgia 4 - Jasper**
Jasper
Putnam
Morgan
Greene
Ogelthorpe
Taliaferro
Wilkes
Lincoln
Elbert
Hart

375. **Georgia 5 - Haralson**
Haralson
Carroll
Heard
Troup
Coweta

376. **Georgia 6 - Spalding**
Spalding
Lamar
Upson
Pike
Meriwether
Monroe
Crawford
Taylor
Talbot
Harris

377. **Georgia 7 - Hancock**
Hancock
Baldwin
Wilkinson
Laurens
Washington
Johnson

378. **Georgia 8 - Warren**
Warren
Glascock
Jefferson
Emanuel
Candler
Bulloch
Screven
Jenkins
Burke
Treutlen

GEORGIA (Continued)

379. **Georgia 9 - Marion**
Marion
Schley
Macon
Dooly
Crisp
Sumter
Webster
Terrell
Randolph
Clay
Quitman
Stewart

380. **Georgia 10 - Bleckley**
Bleckley
Pulaski
Dodge
Wilcox
Telfair
Ben Hill
Turner
Irwin
Coffee
Jeff Davis
Wheeler
Montgomery

381. **Georgia 11 - Toombs**
Toombs
Tattnall
Evans
Appling
Bacon
Ware
Pierce
Brantley
Charlton

382. **Georgia 12 - Liberty**
Liberty
Long
McIntosh
Wayne
Glynn
Camden

GEORGIA (Continued)

383. **Georgia 13 - Early**
Early
Calhoun
Baker
Miller
Decatur
Mitchell
Grady
Thomas
Seminole

384. **Georgia 14 - Worth**
Worth
Tift
Berrien
Colquitt
Cook
Lanier
Lowndes
Clinch
Echols
Atkinson
Brooks

HAWAII

385. **Hawaii 1 - Kauai**
Kauai

386. **Hawaii 2 - Maui**
Maui
Kalawao

387. **Hawaii 3 - Hawaii**
Hawaii

IDAHO

388. **Idaho 1 - Boundary**
Boundary
Bonner
Kootenai
Shoshone
Benewah
Latah
Nez Perce
Lewis
Clearwater

IDAHO (Continued)

389. **Idaho 2 - Idaho**
Idaho
Adams
Washington
Valley
Payette
Gem

390. **Idaho 3 - Lemhi**
Lemhi
Custer
Boise

391. **Idaho 4 - Elmore**
Elmore
Owyhee
Canyon

392. **Idaho 5 - Butte**
Butte
Blaine
Camas
Gooding
Lincoln
Twin Falls
Jerome
Minidoka
Cassia

393. **Idaho 6 - Clark**
Clark
Fremont
Jefferson
Madison
Teton
Bingham
Bonneville
Power
Bannock
Caribou
Oneida
Franklin
Bear Lake

ILLINOIS

394. **Illinois 1 - Jo Daviess**
Jo Daviess
Stephenson
Carroll
Ogle
De Kalb
Whiteside
Lee

395. **Illinois 2 - Bureau**
Bureau
La Salle
Stark
Putnam
Marshall
Livingston
Ford
Iroquois

396. **Illinois 3 - Mercer**
Mercer
Knox
Warren
Henderson
Hancock
Fulton
McDonough
Schuyler

397. **Illinois 4 - Adams**
Adams
Brown
Cass
Pike
Scott
Morgan
Calhoun
Greene
Macoupin

398. **Illinois 5 - Mason**
Mason
Logan
De Witt
Piatt
Moultrie

ILLINOIS (Continued)

399. **Illinois 6 - Montgomery**
Montgomery
Christian
Shelby
Bond
Fayette
Effingham
Marion

400. **Illinois 7 - Vermilion**
Vermilion
Douglas
Coles
Edgar
Cumberland
Jasper
Crawford
Clark

401. **Illinois 8 - Washington**
Washington
Jefferson
Randolph
Perry
Franklin
Jackson
Williamson
Union
Johnson
Alexander
Pulaski
Massac

402. **Illinois 9 - Clay**
Clay
Richland
Lawrence
Wayne
Edwards
Wabash
Hamilton
White
Saline
Gallatin
Pope
Hardin

INDIANA

403. **Indiana 1 - Newton**
Newton
La Porte
Starke
Pulaski
Jasper
White

404. **Indiana 2 - Kosciusko**
Kosciusko
Noble
Steuben
Lagrange

405. **Indiana 3 - Huntington**
Huntington
Grant
Blackford
Jay

406. **Indiana 4 - Miami**
Miami
Fulton
Cass
Carroll
Clinton
Wabash

407. **Indiana 5 - Warren**
Warren
Fountain
Montgomery
Parke
Putnam
Benton

408. **Indiana 6 - Randolph**
Randolph
Henry
Wayne
Rush
Fayette
Union
Franklin

INDIANA (Continued)

409. **Indiana 7 - Owen**
Owen
Greene
Knox
Daviess
Martin
Pike
Dubois
Perry
Spencer

410. **Indiana 8 - Brown**
Brown
Bartholomew
Lawrence
Jackson
Orange
Washington
Crawford
Harrison

411. **Indiana 9 - Decatur**
Decatur
Jennings
Ripley
Ohio
Switzerland
Jefferson
Scott

IOWA

412. **Iowa 1 - Mills**
Mills
Montgomery
Adams
Fremont
Page
Taylor

413. **Iowa 2 - Union**
Union
Clarke
Lucas
Ringgold
Decatur
Wayne

IOWA (Continued)

414. **Iowa 3 - Monroe**
Monroe
Wapello
Appanoose
Davis
Van Buren
Jefferson

415. **Iowa 4 - Muscatine**
Muscatine
Louisa
Henry
Des Moines
Lee

416. **Iowa 5 - Jackson**
Jackson
Jones
Cedar
Clinton

417. **Iowa 6 - Iowa**
Iowa
Keokuk
Poweshiek
Mahaska
Jasper
Marion
Washington

418. **Iowa 7 - Audubon**
Audubon
Guthrie
Cass
Adair
Madison

419. **Iowa 8 - Monona**
Monona
Crawford
Harrison
Shelby

420. **Iowa 9 - Ida**
Ida
Sac
Calhoun
Carroll
Greene

IOWA (Continued)

421. **Iowa 10 - Humboldt**
Humboldt
Wright
Webster
Hamilton
Boone
Story

422. **Iowa 11 - Hardin**
Hardin
Grundy
Marshall
Tama
Benton

423. **Iowa 12 - Winneshiek**
Winneshiek
Allamakee
Fayette
Clayton
Buchanan
Delaware

424. **Iowa 13 - Mitchell**
Mitchell
Howard
Floyd
Chickasaw
Butler

425. **Iowa 14 - Kossuth**
Kossuth
Winnebago
Worth
Hancock
Cerro Gordo
Franklin

426. **Iowa 15 - Dickinson**
Dickinson
Emmet
Palo Alto
Pocahontas
Buena Vista
Clay

IOWA (Continued)

427. **Iowa 16 - Lyon**
Lyon
Osceola
Sioux
O'Brien
Plymouth
Cherokee

KANSAS

428. **Kansas 1 - Cheyenne**
Cheyenne
Rawlins
Decatur
Sherman
Thomas
Sheridan

429. **Kansas 2 - Norton**
Norton
Phillips
Smith
Graham
Rooks
Osborne

430. **Kansas 3 - Jewell**
Jewell
Republic
Washington
Mitchell
Cloud
Clay
Lincoln
Ottawa

431. **Kansas 4 - Marshall**
Marshall
Nemaha
Riley
Pottawatomie
Geary

432. **Kansas 5 - Brown**
Brown
Doniphan
Jackson
Atchison
Leavenworth

KANSAS (Continued)

433. **Kansas 6 - Wallace**
Wallace
Logan
Gove
Greeley
Wichita
Scott
Lane

434. **Kansas 7 - Trego**
Trego
Ellis
Russell
Ness
Rush
Barton
Pawnee

435. **Kansas 8 - Ellsworth**
Ellsworth
Saline
Dickinson
Rice
McPherson
Marion

436. **Kansas 9 - Morris**
Morris
Wabaunsee
Chase
Lyon
Greenwood

437. **Kansas 10 - Franklin**
Franklin
Coffey
Anderson
Linn
Woodson
Allen
Bourbon
Miami

KANSAS (Continued)

438. **Kansas 11 - Hamilton**
Hamilton
Kearney
Finney
Stanton
Grant
Haskell
Morton
Stevens
Seward

439. **Kansas 12 - Hodgeman**
Hodgeman
Gray
Ford
Meade
Clark

440. **Kansas 13 - Edwards**
Edwards
Stafford
Kiowa
Pratt
Comanche
Barber

441. **Kansas 14 - Reno**
Reno
Harvey
Kingman
Harper
Sumner
Cowley

442. **Kansas 15 - Elk**
Elk
Wilson
Neosho
Crawford
Chautauqua
Montgomery
Labette
Cherokee

KENTUCKY

443. **Kentucky 1 - Fulton**
Fulton
Hickman
Carlisle
Ballard
McCracken
Graves
Marshall
Calloway

444. **Kentucky 2 - Union**
Union
Webster
Hopkins
Crittenden
Livingston
Caldwell
Lyon
Trigg

445. **Kentucky 3 - Meade**
Meade
Breckinridge
Hancock
Ohio
Grayson
McLean
Muhlenberg
Butler
Edmondson
Todd
Logan
Warren
Simpson
Allen

446. **Kentucky 4 - Spencer**
Spencer
Anderson
Hardin
Nelson
Washington
Mercer
Marion
Larue
Green
Taylor

KENTUCKY (Continued)

447. **Kentucky 5 - Barren**
Barren
Monroe
Metcalfe
Adair
Cumberland
Russell
Clinton
Wayne
McCreary
Hart

448. **Kentucky 6 - Madison**
Madison
Garrard
Boyle
Casey
Lincoln
Rockcastle
Pulaski
Laurel

449. **Kentucky 7 - Trimble**
Trimble
Carroll
Gallatin
Henry
Franklin
Owen
Grant
Pendleton
Harrison
Shelby

450. **Kentucky 8 - Mason**
Mason
Lewis
Fleming
Bath
Montgomery
Rowan
Bracken
Robertson
Nicholas
Menifee

KENTUCKY (Continued)

451. **Kentucky 9 - Elliott**
Elliott
Lawrence
Morgan
Magoffin
Johnson
Martin
Floyd
Pike

452. **Kentucky 10 - Powell**
Powell
Estill
Wolfe
Lee
Jackson
Owsley
Breathitt
Perry
Knott
Letcher

453. **Kentucky 11 - Clay**
Clay
Leslie
Whitley
Knox
Bell
Harlan

LOUISIANA

454. **Louisiana 1 - Claiborne**
Claiborne
Union
Lincoln
Bienville
Jackson

455. **Louisiana 2 - Morehouse**
Morehouse
West Carroll
Richland
Madison
Franklin
Tensas
East Carroll

LOUISIANA (Continued)

456. **Louisiana 3 - De Soto**
De Soto
Red River
Sabine
Natchitoches
Vernon

457. **Louisiana 4 - Caldwell**
Caldwell
Winn
La Salle
Catahoula
Concordia

458. **Louisiana 5 - Beauregard**
Beauregard
Allen
Evangeline
Avoyelles
St. Landry
Acadia
Jefferson Davis
Cameron
Vermilion
Pointe Coupee

459. **Louisiana 6 - Iberville**
Iberville
Iberia
St. Mary
Assumption

460. **Louisiana 7 - West Feliciana**
West Feliciana
East Feliciana
St. Helena
Tangipahoa
Washington

461. **Louisiana 8 - St. James**
St. James
St. Charles
St. John the Baptist

462. **Louisiana 9 - Plaquemines**
Plaquemines

MAINE

463. **Maine 1 - Oxford**
Oxford
Franklin

464. **Maine 2 - Somerset**
Somerset
Piscataquis
Aroostook

465. **Maine 3 - Kennebec**
Kennebec
Waldo
Knox
Lincoln

466. **Maine 4 - Washington**
Washington
Hancock

MARYLAND

467. **Maryland 1 - Garrett**
Garrett

468. **Maryland 2 - Kent**
Kent
Talbot
Caroline
Dorchester
St. Mary's
Somerset
Wicomico
Worcester
Calvert
Queen Anne's

469. **Maryland 3 - Frederick**
Frederick

MASSACHUSETTS

470. **Massachusetts 1 - Franklin**
Franklin

471. **Massachusetts 2 - Barnstable**
Barnstable
Dukes
Nantucket

MICHIGAN

472. **Michigan 1 - Gogebic**
Gogebic
Ontonagon
Houghton
Keweenaw
Baraga
Iron
Marquette
Dickinson
Menominee

473. **Michigan 2 - Alger**
Alger
Delta
Schoolcraft
Luce
Chippewa
Mackinac

474. **Michigan 3 - Emmet**
Emmet
Charlevoix
Antrim
Grand Traverse
Kalkaska

475. **Michigan 4 - Cheboygan**
Cheboygan
Presque Isle
Otsego
Montmorency
Alpena
Crawford
Oscoda
Alcona

476. **Michigan 5 - Manistee**
Manistee
Wexford
Missaukee
Mason
Lake
Osceola
Leelanau
Benzie

MICHIGAN (Continued)

477. **Michigan 6 - Roscommon**
Roscommon
Ogemaw
Iosco
Clare
Gladwin
Arenac

478. **Michigan 7 - Newaygo**
Newaygo
Mecosta
Isabella
Montcalm
Gratiot

479. **Michigan 8 - Allegan**
Allegan

480. **Michigan 9 - Cass**
Cass
St. Joseph
Hillsdale
Lenawee
Branch

481. **Michigan 10 - Tuscola**
Tuscola
Sanilac
Huron

MINNESOTA

482. **Minnesota 1 - Kittson**
Kittson
Roseau
Marshall
Pennington
Red Lake

483. **Minnesota 2 - Lake of the Woods**
Lake of the Woods
Beltrami
Clearwater
Norman
Mahnomen

484. **Minnesota 3 - Koochiching**
Koochiching
Itasca

MINNESOTA (Continued)

485. **Minnesota 4 - Lake**
Lake
Cook

486. **Minnesota 5 - Wilkin**
Wilkin
Becker
Otter Tail
Traverse
Grant
Douglas
Big Stone
Stevens
Pope
Swift
Todd
Wadena

487. **Minnesota 6 - Hubbard**
Hubbard
Cass
Crow Wing
Morrison
Aitkin
Carlton
Mille Lacs
Kanabec
Pine
Isanti

488. **Minnesota 7 - Chippewa**
Chippewa
Kandiyohi
Meeker
Renville
McLeod
Sibley
Nicollet

489. **Minnesota 8 - Lac qui Parle**
Lac qui Parle
Yellow Medicine
Lincoln
Lyon
Redwood

MINNESOTA (Continued)

490. **Minnesota 9 - Pipestone**
Pipestone
Murray
Watonwan
Rock
Nobles
Jackson
Martin
Brown
Cottonwood

491. **Minnesota 10 - Le Sueur**
Le Sueur
Rice
Blue Earth
Waseca
Steele
Faribault
Freeborn

492. **Minnesota 11 - Goodhue**
Goodhue
Wabasha
Dodge
Winona
Mower
Fillmore
Houston

MISSISSIPPI

493. **Mississippi 1 - Tunica**
Tunica
Tate
Marshall
Coahoma
Quitman
Panola
Lafayette

494. **Mississippi 2 - Benton**
Benton
Tippah
Alcorn
Tishomingo
Prentiss
Union
Pontotoc
Lee
Itawamba

MISSISSIPPI (Continued)

495. **Mississippi 3 - Bolivar**
Bolivar
Sunflower
Tallahatchie
Leflore
Carroll
Holmes

496. **Mississippi 4 - Yalobusha**
Yalobusha
Granada
Calhoun
Chickasaw
Clay
Monroe

497. **Mississippi 5 - Washington**
Washington
Issaquena
Warren
Sharkey
Humphreys
Yazoo

498. **Mississippi 6 - Montgomery**
Montgomery
Webster
Choctaw
Oktibbeha
Lowndes
Attala
Winston
Noxubee

499. **Mississippi 7 - Leake**
Leake
Neshoba
Kemper
Scott
Newton
Lauderdale

500. **Mississippi 8 - Claiborne**
Claiborne
Jefferson
Adams
Franklin
Wilkinson
Amite
Lincoln
Pike

MISSISSIPPI (Continued)

501. **Mississippi 9 - Copiah**
Copiah
Simpson
Lawrence
Jefferson Davis
Walthall
Marion

502. **Mississippi 10 - Smith**
Smith
Jasper
Clarke
Covington
Jones
Wayne

503. **Mississippi 11 - Lamar**
Lamar
Forrest
Perry
Greene
George
Pearl River

MISSOURI

504. **Missouri 1 - Atchison**
Atchison
Nodaway
Worth
Gentry
Holt

505. **Missouri 2 - Harrison**
Harrison
Mercer
Putnam
Grundy
Sullivan

506. **Missouri 3 - Schuyler**
Schuyler
Scotland
Clark
Adair
Knox
Lewis

MISSOURI (Continued)

507. **Missouri 4 - De Kalb**
De Kalb
Daviess
Clinton
Caldwell
Livingston
Carroll

508. **Missouri 5 - Linn**
Linn
Macon
Shelby
Chariton
Randolph

509. **Missouri 6 - Marion**
Marion
Monroe
Ralls
Audrain
Pike

510. **Missouri 7 - Saline**
Saline
Howard
Johnson
Pettis
Cooper
Lafayette

511. **Missouri 8 - Callaway**
Callaway
Montgomery
Lincoln
Warren

512. **Missouri 9 - Bates**
Bates
Henry
Vernon
St. Clair
Cedar

513. **Missouri 10 - Benton**
Benton
Hickory
Camden
Polk
Dallas

MISSOURI (Continued)

514. **Missouri 11 - Moniteau**
Moniteau
Morgan
Cole
Miller
Osage
Gasconade

515. **Missouri 12 - Maries**
Maries
Crawford
Dent
Pulaski
Phelps

516. **Missouri 13 - Washington**
Washington
St. Francois
Ste. Genevieve

517. **Missouri 14 - Barton**
Barton
Dade
Lawrence
McDonald
Barry

518. **Missouri 15 - Stone**
Stone
Taney
Ozark
Douglas
Howell

519. **Missouri 16 - Laclede**
Laclede
Webster
Wright
Texas

520. **Missouri 17 - Shannon**
Shannon
Reynolds
Iron
Oregon
Carter
Ripley

MISSOURI (Continued)

521. **Missouri 18 - Perry**
Perry
Madison
Wayne
Bollinger
Cape Girardeau

522. **Missouri 19 - Stoddard**
Stoddard
Scott
Mississippi
New Madrid
Dunklin
Pemiscot
Butler

MONTANA

523. **Montana 1 - Lincoln**
Lincoln
Flathead
Glacier
Sanders
Lake
Teton
Pondera

524. **Montana 2 - Toole**
Toole
Liberty
Hill
Blaine
Chouteau

525. **Montana 3 - Phillips**
Phillips
Valley
Garfield

526. **Montana 4 - Daniels**
Daniels
Sheridan
Roosevelt
McCone
Richland
Dawson
Wibaux

MONTANA (Continued)

527. **Montana 5 - Mineral**
Mineral
Missoula
Powell
Lewis and Clark
Ravalli
Granite

528. **Montana 6 - Deer Lodge**
Deer Lodge
Silver Bow
Jefferson
Broadwater
Meagher
Judith Basin
Wheatland

529. **Montana 7 - Fergus**
Fergus
Petroleum
Golden Valley
Musselshell
Sweet Grass
Stillwater

530. **Montana 8 - Beaverhead**
Beaverhead
Madison
Gallatin
Park

531. **Montana 9 - Carbon**
Carbon
Big Horn
Treasure
Rosebud

532. **Montana 10 - Prairie**
Prairie
Custer
Fallon
Powder River
Carter

NEBRASKA

533. **Nebraska 1 - Sioux**
Sioux
Dawes
Box Butte
Sheridan
Scotts Bluff
Banner
Kimball
Morrill
Cheyenne
Garden
Deuel

534. **Nebraska 2 - Cherry**
Cherry
Keya Paha
Brown
Rock
Boyd
Holt
Garfield
Wheeler

535. **Nebraska 3 - Knox**
Knox
Antelope
Cedar
Dixon
Pierce
Madison
Stanton
Wayne
Cuming
Thurston
Burt

536. **Nebraska 4 - Grant**
Grant
Arthur
Hooker
McPherson
Thomas
Logan
Blaine
Loup
Custer
Valley
Sherman
Greeley
Howard

NEBRASKA (Continued)

537. **Nebraska 5 - Boone**
Boone
Nance
Merrick
Platte
Polk
Colfax
Butler
Dodge
Washington
Saunders

538. **Nebraska 6 - Keith**
Keith
Perkins
Lincoln
Dawson
Buffalo

539. **Nebraska 7 - Hall**
Hall
Hamilton
York
Seward

540. **Nebraska 8 - Chase**
Chase
Dundy
Hayes
Hitchcock
Frontier
Red Willow
Gosper
Furnas
Phelps
Harlan
Kearney
Franklin

541. **Nebraska 9 - Adams**
Adams
Webster
Clay
Nuckolls
Fillmore
Thayer
Saline
Jefferson

NEBRASKA (Continued)

542. **Nebraska 10 - Cass**
Cass
Otoe
Gage
Johnson
Nemaha
Pawnee
Richardson

NEVADA

543. **Nevada 1 - Humboldt**
Humboldt
Pershing
Churchill

544. **Nevada 2 - Lander**
Lander
Eureka
Elko

545. **Nevada 3 - Storey**
Storey
Douglas
Lyon
Carson City

546. **Nevada 4 - Mineral**
Mineral
Esmeralda
Nye

547. **Nevada 5 - White Pine**
White Pine
Lincoln

NEW HAMPSHIRE

548. **New Hampshire 1 - Coos**
Coos
Grafton
Sullivan
Cheshire

549. **New Hampshire 2 - Carroll**
Carroll
Belknap
Merrimack

NEW JERSEY

550. **New Jersey 1 - Hunterdon**
Hunterdon

551. **New Jersey 2 - Ocean**
Ocean

552. **New Jersey 3 - Sussex**
Sussex

NEW MEXICO

553. **New Mexico 1 - San Juan**
San Juan
McKinley
Cibola
Rio Arriba
Taos

554. **New Mexico 2 - Colfax**
Colfax
Union
Mora
Harding

555. **New Mexico 3 - Catron**
Catron
Valencia
Socorro
Sierra

556. **New Mexico 4 - Santa Fe**
Santa Fe
San Miguel
Torrance
Guadalupe
De Baca
Quay
Curry
Roosevelt
Los Alamos

557. **New Mexico 5 - Grant**
Grant
Hidalgo
Luna

NEW MEXICO (Continued)

558. **New Mexico 6 - Lincoln**
Lincoln
Chaves
Otero
Eddy
Lea

NEW YORK

559. **New York 1 - Jefferson**
Jefferson
St. Lawrence
Lewis

560. **New York 2 - Franklin**
Franklin
Clinton
Essex
Hamilton
Fulton

561. **New York 3 - Chautauqua**
Chautauqua
Cattaraugus
Genesee
Wyoming
Allegany
Steuben

562. **New York 4 - Yates**
Yates
Seneca
Schuyler
Cayuga
Tompkins
Cortland
Chenango

563. **New York 5 - Otsego**
Otsego
Delaware
Schoharie
Sullivan
Ulster

564. **New York 6 - Columbia**
Columbia
Greene

NORTH CAROLINA

565. **North Carolina 1 - Cherokee**
Cherokee
Clay
Graham
Macon
Swain
Haywood
Jackson
Transylvania

566. **North Carolina 2 - Yancey**
Yancey
Mitchell
Avery
Watauga
Caldwell

567. **North Carolina 3 - Ashe**
Ashe
Wilkes
Alleghany
Surry

568. **North Carolina 4 - Henderson**
Henderson
Polk
Rutherford
Cleveland
McDowell
Lincoln

569. **North Carolina 5 - Anson**
Anson
Montgomery
Richmond
Scotland

570. **North Carolina 6 - Chatham**
Chatham
Moore
Lee

571. **North Carolina 7 - Rockingham**
Rockingham
Caswell
Person
Granville
Vance
Warren
Franklin

NORTH CAROLINA (Continued)

572. **North Carolina 8 - Northampton**
Northampton
Halifax
Nash
Wilson
Edgecombe

573. **North Carolina 9 - Camden**
Camden
Pasquotank
Perquimans
Chowan
Gates
Hertford
Bertie

574. **North Carolina 10 - Harnett**
Harnett
Johnston
Wayne

575. **North Carolina 11 - Hoke**
Hoke
Robeson
Bladen
Columbus

576. **North Carolina 12 - Sampson**
Sampson
Duplin
Pender

577. **North Carolina 13 - Greene**
Greene
Lenoir
Jones
Craven
Carteret
Pamlico

578. **North Carolina 14 - Pitt**
Pitt
Martin
Washington
Tyrrell
Dare
Beaufort
Hyde

NORTH CAROLINA (Continued)

579. **North Carolina 15 - Cabarrus**
Cabarrus
Rowan
Iredell
Davie
Stanly

NORTH DAKOTA

580. **North Dakota 1 - Divide**
Divide
Williams
Mountrail
Burke
Renville
McLean
Ward

581. **North Dakota 2 - Bottineau**
Bottineau
Rolette
McHenry
Pierce
Benson
Towner
Cavalier
Ramsey

582. **North Dakota 3 - Barnes**
Barnes
La Moure
Dickey
Pembina
Walsh
Nelson
Griggs
Steele
Traill
Ransom
Sargent
Richland

NORTH DAKOTA (Continued)

583. **North Dakota 4 - McKenzie**
McKenzie
Dunn
Billings
Golden Valley
Stark
Slope
Bowman
Hettinger
Adams
Grant
Sioux
Mercer
Oliver

584. **North Dakota 5 - Kidder**
Kidder
Stutsman
Emmons
Eddy
Foster
Sheridan
Wells
Logan
McIntosh

OHIO

585. **Ohio 1 - Williams**
Williams
Defiance
Henry
Paulding

586. **Ohio 2 - Sandusky**
Sandusky
Erie
Seneca
Huron

587. **Ohio 3 - Ashtabula**
Ashtabula

588. **Ohio 4 - Mercer**
Mercer
Darke
Shelby
Logan
Union

OHIO (Continued)

589. **Ohio 5 - Hancock**
Hancock
Hardin
Wyandot
Crawford
Marion

590. **Ohio 6 - Morrow**
Morrow
Ashland
Knox
Wayne
Holmes
Coshocton
Licking

591. **Ohio 7 - Tuscarawas**
Tuscarawas
Harrison
Muskingum
Guernsey
Noble
Monroe

592. **Ohio 8 - Clinton**
Clinton
Fayette
Highland
Brown
Adams

593. **Ohio 9 - Ross**
Ross
Pike
Jackson
Scioto
Gallia

594. **Ohio 10 - Perry**
Perry
Morgan
Hocking
Athens
Vinton
Meigs

595. **Ohio 11 - Columbiana**
Columbiana

OKLAHOMA

596. **Oklahoma 1 - Cimarron**
Cimarron
Texas
Beaver

597. **Oklahoma 2 - Harper**
Harper
Ellis
Woods
Alfalfa
Major
Woodward

598. **Oklahoma 3 - Grant**
Grant
Kay
Noble
Logan
Pawnee
Payne
Lincoln

599. **Oklahoma 4 - Nowata**
Nowata
Craig
Ottawa
Washington
Delaware
Cherokee
Adair

600. **Oklahoma 5 - Roger Mills**
Roger Mills
Dewey
Custer
Blaine
Kingfisher

601. **Oklahoma 6 - Seminole**
Seminole
Okfuskee
Okmulgee
Hughes
McIntosh
Muskogee
Pittsburg

OKLAHOMA (Continued)

602. **Oklahoma 7 - Beckham**
Beckham
Washita
Harmon
Greer
Kiowa
Caddo
Grady

603. **Oklahoma 8 - Jackson**
Jackson
Tillman
Cotton
Stephens
Jefferson

604. **Oklahoma 9 - Garvin**
Garvin
Murray
Carter
Love
Pontotoc
Johnston
Marshall
Coal
Atoka
Bryan

605. **Oklahoma 10 - Haskell**
Haskell
Latimer
Pushmataha
Choctaw
McCurtain

OREGON

606. **Oregon 1 - Clatsop**
Clatsop
Columbia
Tillamook
Yamhill

607. **Oregon 2 - Hood River**
Hood River
Wasco
Sherman
Gilliam
Morrow
Jefferson
Wheeler

OREGON (Continued)

608. **Oregon 3 - Umatilla**
Umatilla
Union
Wallowa
Grant
Baker
Malheur

609. **Oregon 4 - Lincoln**
Lincoln
Benton
Linn

610. **Oregon 5 - Coos**
Coos
Douglas
Curry
Josephine

611. **Oregon 6 - Crook**
Crook
Deschutes
Harney
Klamath
Lake

PENNSYLVANIA

612. **Pennsylvania 1 - Crawford**
Crawford
Warren
Venango
Forest

613. **Pennsylvania 2 - McKean**
McKean
Elk
Cameron

614. **Pennsylvania 3 - Potter**
Potter
Tioga
Clinton

615. **Pennsylvania 4 - Bradford**
Bradford
Sullivan
Wyoming

PENNSYLVANIA (Continued)

616. **Pennsylvania 5 - Wayne**
Wayne
Pike

617. **Pennsylvania 6 - Lawrence**
Lawrence
Butler
Clarion
Armstrong

618. **Pennsylvania 7 - Jefferson**
Jefferson
Indiana
Clearfield

619. **Pennsylvania 8 - Union**
Union
Columbia
Snyder
Montour
Northumberland
Schuylkill

620. **Pennsylvania 9 - Greene**
Greene
Fayette

621. **Pennsylvania 10 - Bedford**
Bedford
Fulton
Franklin

622. **Pennsylvania 11 - Huntington**
Huntingdon
Mifflin
Juniata

623. **Pennsylvania 12 - Lebanon**
Lebanon

RHODE ISLAND

624. **Rhode Island 1 - Newport**
Newport

SOUTH CAROLINA

625. **South Carolina 1 - Oconee**
Oconee

SOUTH CAROLINA (Continued)

626. **South Carolina 2 - Laurens**
Laurens
Greenwood
McCormick
Edgefield
Saluda
Newberry
Abbeville

627. **South Carolina 3 - Cherokee**
Cherokee
Union
Chester
Fairfield

628. **South Carolina 4 - Chesterfield**
Chesterfield
Kershaw
Dillon
Marlboro
Darlington

629. **South Carolina 5 - Georgetown**
Georgetown
Marion
Horry

630. **South Carolina 6 - Clarendon**
Clarendon
Williamsburg
Lee
Sumter

631. **South Carolina 7 - Calhoun**
Calhoun
Orangeburg
Barnwell
Bamberg
Allendale

632. **South Carolina 8 - Hampton**
Hampton
Colleton
Jasper
Beaufort

633. **South Carolina 9 - Lancaster**
Lancaster
York

SOUTH DAKOTA

634. **South Dakota 1 - Harding**
Harding
Perkins
Butte
Lawrence

635. **South Dakota 2 - Corson**
Corson
Ziebach
Dewey
Campbell
Walworth
Potter

636. **South Dakota 3 - McPherson**
McPherson
Edmunds
Brown
Faulk
Spink

637. **South Dakota 4 - Marshall**
Marshall
Roberts
Day
Clark
Grant
Codington
Hamlin
Deuel

638. **South Dakota 5 - Custer**
Custer
Fall River
Shannon

639. **South Dakota 6 - Haakon**
Haakon
Stanley
Jackson
Bennett
Jones
Lyman
Mellette
Todd
Tripp
Gregory

SOUTH DAKOTA (Continued)

640. **South Dakota 7 - Sully**
Sully
Hughes
Hyde
Hand
Buffalo
Jerauld
Brule
Aurora
Davison
Douglas
Charles Mix

641. **South Dakota 8 - Kingsbury**
Kingsbury
Brookings
Beadle
Sanborn
Miner
Lake
Moody

642. **South Dakota 9 - Hanson**
Hanson
McCook
Hutchinson
Turner
Lincoln
Bon Homme
Yankton
Clay
Union

TENNESSEE

643. **Tennessee 1 - Lake**
Lake
Obion
Dyer
Lauderdale
Crockett
Gibson
Weakley
Henry
Carroll
Benton
Stewart
Houston
Humphreys

TENNESSEE (Continued)

644. **Tennessee 2 - Cannon**
Cannon
De Kalb
Coffee
Warren
White
Van Buren
Grundy
Smith

645. **Tennessee 3 - Macon**
Macon
Trousdale
Roane
Cumberland
Clay
Jackson
Putnam
Pickett
Overton
Fentress
Scott
Morgan
Campbell
Claiborne
Hancock

646. **Tennessee 4 - Hamblen**
Hamblen
Greene
Cocke
Grainger
Jefferson
Sevier

647. **Tennessee 5 - Fayette**
Fayette
Haywood
Madison
Hardeman
Chester
Henderson
McNairy
Hardin
Decatur
Perry
Wayne
Hickman
Lewis
Lawrence

TENNESSEE (Continued)

648. **Tennessee 6 - Giles**
Giles
Marshall
Lincoln
Moore
Bedford
Franklin

649. **Tennessee 7 - Bledsoe**
Bledsoe
Rhea
Meigs
Bradley
McMinn
Polk
Monroe
Loudon

650. **Tennessee 8 - Johnson**
Johnson

651. **Tennessee 9 - Maury**
Maury

TEXAS

652. **Texas 1 - Dallam**
Dallam
Hartley
Oldham
Deaf Smith
Sherman
Moore

653. **Texas 2 - Hansford**
Hansford
Ochiltree
Lipscomb
Hutchinson
Roberts
Hemphill
Carson
Gray
Wheeler
Armstrong
Donley
Collingsworth

TEXAS (Continued)

654. **Texas 3 - Parmer**
Parmer
Castro
Swisher
Bailey
Lamb
Hale
Cochran
Hockley
Yoakum
Terry
Lynn

655. **Texas 4 - Briscoe**
Briscoe
Hall
Childress
Floyd
Motley
Cottle
Crosby
Dickens
King
Garza
Kent
Stonewall

656. **Texas 5 - Hardeman**
Hardeman
Foard
Knox
Haskell
Shackelford
Throckmorton
Baylor
Wilbarger
Archer
Young
Stephens

657. **Texas 6 - Jack**
Jack
Palo Pinto
Montague
Cooke

TEXAS (Continued)

658. **Texas 7 - Fannin**
Fannin
Hunt
Rains
Lamar
Delta
Hopkins
Wood
Red River
Franklin
Titus
Camp
Upshur
Morris
Cass
Marion

659. **Texas 8 - Gaines**
Gaines
Andrews
Dawson
Martin
Borden
Howard
Glasscock
Scurry
Mitchell
Sterling
Fisher
Nolan
Coke

660. **Texas 9 - Runnels**
Runnels
Coleman
Eastland
Brown
Mills
Comanche
Erath
Somervell
Hamilton
Bosque
Hill

TEXAS (Continued)

661. **Texas 10 - Navarro**
Navarro
Van Zandt
Henderson
Limestone
Falls
Milam
Robertson
Leon
Anderson
Freestone

662. **Texas 11 - Cherokee**
Cherokee
Rusk
Panola
Nacogdoches
Angelina
San Augustine
Shelby
Sabine

663. **Texas 12 - Hudspeth**
Hudspeth
Culbertson
Jeff Davis
Presidio
Brewster

664. **Texas 13 - Reeves**
Reeves
Pecos
Terrell

665. **Texas 14 - Loving**
Loving
Ward
Crane
Upton
Reagan
Irion
Crockett
Schleicher
Sutton
Winkler

TEXAS (Continued)

666. **Texas 15 - Concho**
Concho
Menard
Llano
Kimble
McCulloch
Mason
Kerr
Gillespie
Kendall
Blanco
Burnet
Lampasas
San Saba

667. **Texas 16 - Burleson**
Burleson
Lee
Bastrop
Caldwell
Gonzales
Lavaca
Jackson
Matagorda
Wharton
Colorado
Fayette
Austin
Washington

668. **Texas 17 - Newton**
Newton
Jasper
Tyler
Polk
San Jacinto
Walker
Grimes
Madison
Houston
Trinity

TEXAS (Continued)

669. **Texas 18 - Edwards**
Edwards
Real
Kinney
Uvalde
Medina
Maverick
Zavala
Frio
Dimmit
La Salle
Val Verde
Bandera

670. **Texas 19 - Atascosa**
Atascosa
McMullen
Duval
Live Oak
Jim Wells
Jim Hogg
Zapata
Starr
Brooks
Kenedy
Kleberg
Willacy

671. **Texas 20 - Wilson**
Wilson
Karnes
Bee
Goliad
De Witt
Refugio
Calhoun
Aransas

672. **Texas 21 - Chambers**
Chambers

UTAH

673. **Utah 1 - Box Elder**
Box Elder
Cache
Rich

UTAH (Continued)

674. **Utah 2 - Morgan**
Morgan
Summit
Wasatch

675. **Utah 3 - Juab**
Juab
Millard
Sanpete
Sevier

676. **Utah 4 - Beaver**
Beaver
Iron
Washington

677. **Utah 5 - Carbon**
Carbon
Daggett
Uintah
Emery
Grand
Duchesne

678. **Utah 6 - Piute**
Piute
Wayne
Garfield
Kane
San Juan

VERMONT

679. **Vermont 1 - Franklin**
Franklin
Orleans
Essex
Lamoille
Washington
Caledonia
Orange

680. **Vermont 2 - Addison**
Addison
Rutland
Windsor
Bennington
Windham

VIRGINIA

681. **Virginia 1 - Lee**
Lee
Wise
Dickenson
Buchanan
Russell
Norton City

682. **Virginia 2 - Tazewell**
Tazewell
Galax City
Smyth
Bland
Wythe
Grayson

683. **Virginia 3 - Giles**
Giles
Pulaski
Montgomery
Carroll
Floyd
Patrick
Radford City

684. **Virginia 4 - Bedford**
Bedford
Bedford City
Franklin
Henry
Martinsville City

685. **Virginia 5 - Bath**
Bath
Rockbridge
Alleghany
Buena Vista City
Clifton Forge City
Covington City
Lexington City

686. **Virginia 6 - Highland**
Highland
Augusta
Rockingham
Nelson
Harrisonburg City
Staunton City
Waynesboro City

VIRGINIA (Continued)

687. **Virginia 7 - Buckingham**
Buckingham
Charlotte
Halifax
Prince Edward
Cumberland
South Boston City

688. **Virginia 8 - Amelia**
Amelia
Nottoway
Mecklenburg
Brunswick
Lunenburg

689. **Virginia 9 - Greensville**
Greensville
Sussex
Southampton
Surry
Isle of Wight
Emporia City
Franklin City

690. **Virginia 10 - Frederick**
Frederick
Clarke
Shenandoah
Page
Rappahannock
Fauquier
Warren
Winchester City

691. **Virginia 11 - Madison**
Madison
Culpeper
Orange
Spotsylvania
Louisa
Stafford
Fredericksburg City

VIRGINIA (Continued)

692. **Virginia 12 - Caroline**
Caroline
King George
King William
King and Queen
Essex
Richmond
Westmoreland
Northumberland
Lancaster
Mathews
Northampton
Accomack
Middlesex

WASHINGTON

693. **Washington 1 - Clallam**
Clallam
Jefferson
Island
San Juan
Skagit

694. **Washington 2 - Okanogan**
Okanogan
Chelan
Douglas

695. **Washington 3 - Ferry**
Ferry
Stevens
Pend Oreille

696. **Washington 4 - Grays Harbor**
Grays Harbor
Mason

697. **Washington 5 - Kittitas**
Kittitas
Grant
Lincoln
Adams

698. **Washington 6 - Pacific**
Pacific
Wahkiakum
Lewis
Cowlitz

WASHINGTON (Continued)

699. **Washington 7 - Skamania**
Skamania
Klickitat

700. **Washington 8 - Whitman**
Whitman
Walla Walla
Columbia
Garfield
Asotin

WEST VIRGINIA

701. **West Virginia 1 - Mason**
Mason
Jackson
Roane
Calhoun

702. **West Virginia 2 - Wetzel**
Wetzel
Tyler
Pleasants
Ritchie
Gilmer
Lewis
Doddridge

703. **West Virginia 3 - Monongalia**
Monongalia
Marion
Harrison
Taylor
Barbour
Preston

704. **West Virginia 4 - Grant**
Grant
Pendleton
Hardy
Hampshire
Morgan
Berkeley
Jefferson

WEST VIRGINIA (Continued)

705. **West Virginia 5 - Tucker**
Tucker
Randolph
Upshur
Webster
Braxton
Clay
Nicholas
Pocahontas

706. **West Virginia 6 - Lincoln**
Lincoln
Mingo
Logan
Boone
McDowell
Wyoming

707. **West Virginia 7 - Raleigh**
Raleigh
Fayette
Mercer
Summers
Monroe
Greenbriar

WISCONSIN

708. **Wisconsin 1 - Burnett**
Burnett
Washburn
Polk
Barron

709. **Wisconsin 2 - Bayfield**
Bayfield
Ashland
Iron
Sawyer
Rusk
Price

710. **Wisconsin 3 - Vilas**
Vilas
Oneida
Florence
Lincoln
Langlade
Forest
Taylor

WISCONSIN (Continued)

711. **Wisconsin 4 - Marinette**
Marinette
Oconto
Menominee
Shawano

712. **Wisconsin 5 - Pierce**
Pierce
Dunn
Pepin
Buffalo

713. **Wisconsin 6 - Trempealeau**
Trempealeau
Clark
Jackson
Monroe

714. **Wisconsin 7 - Wood**
Wood
Portage
Waupaca
Juneau
Adams
Marquette
Green Lake
Waushara

715. **Wisconsin 8 - Vernon**
Vernon
Crawford
Richland
Grant
Sauk
Iowa
Lafayette
Green

716. **Wisconsin 9 - Columbia**
Columbia
Dodge
Jefferson
Walworth
Fond du Lac

717. **Wisconsin 10 - Door**
Door
Kewaunee
Manitowoc

WYOMING

718. **Wyoming 1 - Park**
Park
Hot Springs
Big Horn
Washakie

719. **Wyoming 2 - Sheridan**
Sheridan
Johnson
Campbell
Crook
Weston

720. **Wyoming 3 - Lincoln**
Lincoln
Teton
Carbon
Uinta
Sublette
Fremont
Sweetwater

721. **Wyoming 4 - Niobrara**
Niobrara
Albany
Platte
Goshen
Laramie

722. **Wyoming 5 - Converse**
Converse

PUERTO RICO

723. **Puerto Rico 1 - Rincon**
Rincon

724. **Puerto Rico 2 - Adjuntas**
Adjuntas
Guanica
Guayanilla
Lajas
Lares
Las Marias
Maricao
Penuelas
Sabana Grande
San Sebastian
Yauco

PUERTO RICO (Continued)

725. **Puerto Rico 3 - Ciales**
Ciales Municipio
Jayuya Municipio
Morovis Municipio
Orocovis Municipio
Utuado Municipio

726. **Puerto Rico 4 - Aibonito**
Aibonito Municipio
Arroyo Municipio
Barranquitas Municipio
Coamo Municipio
Comerio Municipio
Guayama Municipio
Maunabo Municipio
Patillas Municipio
Salinas Municipio
Santa Isabel Municipio
Yabucoa Municipio

727. **Puerto Rico 5 - Ceiba**
Ceiba Municipio
Naguabo Municipio

728. **Puerto Rico 6 - Vieques**
Vieques Municipio

729. **Puerto Rico 7 - Culebra**
Culebra Municipio

U.S. VIRGIN ISLANDS

730. **Virgin Islands 1 - St. Thomas Island**
St. Thomas Island
St. John Island
and environs

731. **Virgin Islands 2 - St. Croix Island**
St. Croix Island
and environs

GUAM

732. **Guam**
Island of Guam
and environs

OTHER TERRITORIES AND POSSESSIONS

733. **American Samoa**
Eastern District
Manu'a District
Rose Island
Swains Island
Western District

734. **Northern Mariana Islands**
Northern Islands Municipality
Rota Municipality
Saipan Municipality
Tinian Municipality

- FCC -

*U.S. Government Printing Office: 1992 — 312-024/60010